In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
RANLETT & STONE. } No. 218.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellees imported at the port of New Orleans, from Liverpool, England, by several vessels, in 1893 and 1894, about 3,000,000 grain bags, known as cental bags. The merchandise was entered as free of duty under paragraph 493 of the act of October 1, 1890 (26 Stat., 567–603), as bags of American manufacture returned to the United States. Paragraph 493 is as follows:

> Articles the growth, produce, and *manufacture of the United States*, when returned after having been

exported, without having been advanced in value or improved in condition by any process of manufacture, or other means; casks, barrels, carboys, bags, and other vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; * * * *but proof of the identity of such articles shall be made*, under general regulations to be prescribed by the Secretary of the Treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. * * *

The general regulations prescribed by the Secretary of the Treasury contain the following provisions:

CUSTOMS REGULATIONS, 1892.

ART. 331. Articles of the growth, produce, and manufacture of the United States, exported to a foreign country and returned without having been advanced in value or improved in condition by any process of manufacture or other means, and upon which no drawback or bounty has been allowed, are entitled to entry free of duty, but this privilege does not extend to articles exported in bond from a manufacturing warehouse and afterward returned to this country. The exportation must be bona fide and not for the purpose of evading any revenue law.

* * * * *

If returned to the port of original exportation, the fact of regular clearance for a foreign destina-

tion must be shown by the records of the customs, * * * and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and the naval officer, if any, of the port where the exportation was made showing the fact of exportation from that port.

* * * * *

ART. 332. To guard against fraud, and to insure identity, the collector shall require, in addition to proof of clearance, the production of a statement, certified by the proper officer of the customs at the foreign port from which the reimportation was made, and authenticated by the consul of the United States, that such merchandise was imported from the United States in the condition in which it is returned, and that it has not been advanced in value or improved in condition by any process of manufacture or other means.

* * * * *

ART. 335. Casks, barrels, carboys, bags, and vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes, are free of duties, but in case drawback has been allowed upon the exportation of any such articles, they shall on importation be subject to a duty equal to the drawback. Proof of the identity of such articles must be made, and if any of them were subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded, or duty will accrue.

* * * * *

ART. 336. Before entry the following proof shall be required by the collector:

First. A certificate as follows from the shipper, in triplicate, attested by a consul or other proper officer authorized to take affidavits, as follows:

(Cat. No. 773.)

I hereby certify, under oath, that, to the best of my knowledge and belief, the* ——— hereinafter specified, are truly of the manufacture of the United States,† ——— or were exported from the United States, filled with ——— and that it is intended to reship the same to the port of ———, in the United States‡ ——— on board the ——— now lying in the port of ———. I further certify that, to the best of my knowledge and belief, the actual market value of the articles herein named, at this time and in the form in which the same are to be exported to the United States, is as follows§ ———.

——— ———.

Sworn to before me, this —— day of ———, 18—.

——— ———.

Second. A declaration in the entry by the importer of the name of the exporting vessel, the date of the ship's manifest, and the marks and numbers on the articles for which free entry is sought. If the exportation was made by railroad, the waybill may be substituted as evidence for the manifest.

*** Name the articles. † If the packages are empty insert statement of the facts, as "and were exported from the United States filled with the produce of that country." ‡ If the packages contain foreign merchandise insert "filled with" and a declaration of the merchandise they contain. § This blank is to be filled only when the merchandise contained in the packages is subject to a duty ad valorem.**

* * * * *

The marks and numbers should be such as to prove beyond any reasonable doubt the identity of the articles with those entered on the outward manifest. * * *

Third. An affidavit by the importer, attached to the entry, that the articles mentioned therein are to the best of his knowledge and belief truly and bona fide manufactures of the United States, or were bags exported therefrom filled with grain.

* * * * *

Fifth. Verification, after examination, by the appraiser with an endorsement stating whether the articles are of domestic or foreign manufacture.

Such bags and other coverings exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the shipper's manifest upon which they are exported.

* * * * *

The course of the transactions in the case was as follows:

The goods were imported in 1893 and 1894, and upon the arrival in this country of the respective shipments free entry was made and evidence furnished regarding the right to free entry and the character of the goods. Samples of the respective invoices were then sent to the appraiser's office and examined as follows:

From one entry of 600 bales, 70 were ordered to the appraiser's store and 18 of that number were opened by him;

Of another entry of 650 bales, 33 were ordered to the store and 19 were opened;

Of a third entry of 325 bales, 38 were ordered to the store and 13 were opened;

Of a fourth entry of 850 bales, 85 were ordered to the store and 16 were opened;

Of a fifth entry of 350 bales, 21 were ordered to the store and 14 were opened;

Of a sixth entry of 100 bales, 100 were ordered to the store and 10 were opened;

And of a seventh entry of 100 bales, 100 were ordered to the store and 10 were opened.

The examination of the bales opened at the appraiser's was made by the appraiser assisted by an examiner. From the examination thus made the appraiser reported as to *each* importation that the bales contained bags of foreign manufacture, subject to duty, and thereupon the collector made impost entries, assessing duty at the rate of 2 cents per pound on the entire consignment under paragraph 365 of the act of 1890 as "bags for grain made of burlaps." (Certificate, pp. 1 and 2.) The importers protested against the "decision, liquidation, and rate and amount of duties assessed," and carried the matter to the Board of General Appraisers, which affirmed the action of the collector. (See opinion by Sharpe, general appraiser, printed in the appendix).

Under the protest of the importers from the collector's decision the fact was recognized that the bags might be of foreign manufacture. The protest also recognized the examination by the appraiser, but claimed that the examination was not fairly and faithfully performed, and that the assessment was incorrect. The protest does not specifically complain of the *illegality* of the examination, and it bases its final objection to the proceedings upon the contention that section 2910 of the Revised Statutes,

which provides for the assessment of duty upon goods of different values in the same invoice at the rate to which the highest valued goods are subject, does not apply to a mixture of foreign and American bags, on the ground that such goods are of one value. (Certificate p. 2.)

From the decision of the Board of General Appraisers the importers applied for a review to the circuit court, which reversed the decision of the collector and the Board of General Appraisers; and, upon the appeal by the United States from the decree of the circuit court, the following questions were certified to this court by the circuit court of appeals. (Certificate, pp. 3 and 4.)

> First. Whether the returns of the appraiser that the several importations of Ranlett & Stone contained bags of foreign manufacture, based on an examination not in conformity with law or the regulations of the Treasury Department, had the effect of overthrowing the *prima facie* case made by the importers, who were without fraud in the premises, and who had furnished all the proofs required by the customs regulations, to show that their importations were of bags free of duty?
>
> Second. Whether the presence of some bags of foreign manufacture, in a bale imported as composed of American-made bags free of duty, subjects to duty all the bags in the bale, by virtue of the unit rule established by section 2910 of the Revised Statutes, or by the general rules of law applicable to the case?
>
> Third. Whether the presence of foreign-made bags in a bale, imported as composed of American-made bags, the foreign-made bags being indiscriminately mixed in the bale with the American-made

> bags, without the knowledge of the importer and with no intention on his part or on the part of the vendor or shipper to conceal the dutiable bags by mingling them with others free of duty, subjects the whole bale to duty, because the importer who has complied with all the regulations prescribed by the Secretary of the Treasury, as to the character of his importation, fails to separate and designate the American-made bags, which he claims to be free of duty, and although the importer requests the customs officers to make such separation and to indorse on the invoices returned by them the percentage of American-made and foreign-made bags in each bale, which request is refused by the officers on the ground that they could not and would not make such separation, because it necessitated the going through the bales bag by bag to ascertain the percentage.

It further appears from the certificate (p. 3) that the appraiser and examiner, who examined the bales, were not able to say *with certainty* of any one bag that it was of foreign or of American manufacture; but the other witnesses called were no better informed, and it is fair to say that among the other witnesses were the importers themselves.

It seemed to be the case that *no one* could *certainly* tell a foreign-made bag from an American-made bag, for the reason, apparently, that the marks of distinction between them, based upon material, finish, thread, and stitch, were not clearly defined or indicated.

It was upon the evidence from which the foregoing facts are deduced that the court below (the circuit court) found that the examination of the bags was not in con-

formity with law or the Treasury regulations and was void, and that the liquidation of the duties based on the same was illegal and void, and the decree of the court ordered that the collector direct a reexamination to reliquidate the duties. (Certificate, p. 4.) The fact is that the goods had passed into and beyond the importer's possession and disposal, and could not be obtained for such reexamination and reliquidation of duties, and, therefore, that the decree was not capable of performance.

ARGUMENT.

I.

The first question propounded by the circuit court of appeals assumes, because the facts stated do not so establish, (1) that the examination of the bags was not made in conformity with law or the regulations of the Treasury Department; (2) that the importers "were without fraud in the premises" and had "furnished *all* the proofs required by the customs regulations to show that their importations were of bags free of duty;" and (3) that by complying with the regulations of the Treasury Department they had established a *prima facie* case that their importations were not subject to duty.

The certificate nowhere shows affirmatively in what respect the appraiser and examiner failed to comply with the law and regulations; it does not appear from the facts stated that *all* the requirements of the law and of the customs regulations were complied with; and it is not at all clear from the meagre statement made that the

importers established a *prima facie* case. It is also assumed, without reference to facts, that there was no intention on the part of the importer or of the foreign vendor and shipper to conceal dutiable bags by mingling them with others free of duty.

It is to be regretted that the full record of the case as it exists in the circuit court of appeals is not before the court in order that from the facts therein set out the questions certified might be more readily understood. Abstract questions are propounded which are not altogether justified by the concrete case. The Government submits to the court the question whether, in view of all the facts and of the transmittal with the certificate by the circuit court of appeals of a copy of the transcript of the record below, a proper determination of the case does not require the entire record to be before the court.

In order that the questions propounded in the certificate may be more fully understood, and in order that the court may determine whether those questions should be answered without having the entire record before it, there are filed with this brief, for the convenience of the court, printed copies of the record in the circuit court of appeals.

The questions certified are, however, to be regarded in the light of the facts so far as they are disclosed in the certificate. From this it appears that, although ten bales from every hundred were not taken to the appraiser's stores for examination except in two cases (ex steamship *Pallas* and ex steamship *Engineer*), the importers were not injured thereby.

(*a*) THE CLAIM THAT THE EXAMINATION WAS NOT ACCORDING TO LAW.

The statute (section 2901 of the Revised Statutes, printed in the appendix) is not mandatory.

It was intended for the benefit of the Government and not of the importer.

The objection based upon it is exceedingly technical where there is nothing to indicate that injury could have ensued, as where there is no reasonable basis for the claim that one package differs in character and quality from another.

Where the importer may apply to the courts to examine and review everything involving the legality of a demand by the collector, he does not require for his protection that statutes containing directions to officials as to the manner in which they shall be informed of the dutiable character of merchandise shall be regarded as mandatory. (*Origet* v. *Hedden*, 155 U. S., 228; *Erhardt* v. *Schroeder*, 155 U. S., 124.)

The purpose of the statute is to prevent fraud on the revenue by requiring that "the collector shall designate on the invoice at least one package of every invoice and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary * * * to be opened, examined, and appraised." In such a case as this, where the goods were entered as American-made bags, *all* of which were claimed to be entitled to free admission, and where the sole question is whether *all* the merchandise in question was entitled to free entry or not, if in each

package examined the appraiser found dutiable goods, it was not necessary to examine one or more of each ten packages in order to determine whether the whole invoice was dutiable. "In the judgment of the examiner and of two or three of the witnesses, based upon what knowledge and experience they had, all the bales contained both bags of foreign manufacture and bags of American manufacture." "In the opinion of the examiner it was sufficient to find any foreign bags in any bale in order to make the whole bale liable to duty—a bale being in the opinion of the examiner a unit." (Certificate, p. 3.) A further examination would be simply cumulative.

This is strengthened by the fact that, as shown in the certificate (p. 3), no one could "certainly tell a foreign-made bag from an American-made bag." If this is so, then no examination of a larger number of bags than were examined would change the proportion of foreign-made bags found.

Nor is there reason to suppose that one bale differed from another in character or quality; indeed, it was substantially admitted that bags of foreign manufacture and American manufacture were indiscriminately mingled together, and no attempt was made by the importer on entry or afterwards to separate the bags claimed to be free and those which were dutiable.

The protection of the convenience of the taxpayer is not so vital as to authorize the court to treat a statute primarily directed to officers for their guidance and for the substantial protection of the Government as mandatory. The burden is upon the importer of overcoming

the presumption of regularity by proof that the exaction of duties was unlawful. (*Erhardt* v. *Schroeder*, *supra*.)

Besides, the penal provisions of the statute show that it is for the protection of the Government in detecting and punishing fraud. It bears no marks of an intention to protect the importer.

(*b*) THE CLAIM THAT THE EXAMINATION WAS NOT ACCORDING TO THE CUSTOMS REGULATIONS.

The presumption is in favor of the sufficiency and regularity of official action.

It is nowhere shown that the appraiser or the examiner failed to comply with any regulation of the Treasury Department. The presumption is that they did comply with every regulation.

When power or jurisdiction over a subject-matter is delegated to a public officer his official acts done are presumed to have been rightly done, and are, in general, binding and valid. (*Belcher* v. *Linn*, 24 Howard, 508, 522; *Origet* v. *Hedden*, 155 U. S., 228. *Muser* v. *Magone*, 155 U. S., 240.)

The regulations (Art. 336, cl. 5) require "verification after examination by the appraiser," which shows, of course, that statutory proof offered by the importer is not to be accepted as conclusive, but that the appraiser is directed to scrutinize the character of the importation. The appraiser, in the first instance, determines the character of the article described; if the formal proof misdescribes or represents incorrectly the character of the importation, either in the invoice or the entry, payment

of duties can not, therefore, be avoided. Where the misdescription is fraudulent, it is cause for forfeiture and constitutes a crime under section 9 of the customs administrative act. It is the duty of the appraiser "to ascertain, estimate, and appraise (any invoice or affidavit or statement * * * to the contrary nothwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities and actual market value or wholesale price of every of them, as the case may require." (Sec. 10, customs administrative act of June 10, 1890.)

Consequently the appraiser may correct the misdescription or disregard it, so as to perform his duty as required by law. Unless appraisers have this right the grossest frauds may be committed by the importer with perfect impunity, and if they have this right, as clearly they must, it follows that questions as to the nature of the produce imported, and its consequent classification in the invoice and entry, are questions of fact within the jurisdiction of the appraiser. (*Belcher* v. *Linn*, 24 How., 508, 522.) These considerations are as applicable to appraisals under the special conditions of the free-entry regulations as to appraisals generally.

It is suggested, however, that the appraiser or examiner had not "experience or knowledge of the matter in hand sufficient to be able to say with certainty of any one bag that it was of foreign or American manufacture." But it is also stated that "the other witnesses

[among whom, the fact is, were the importers themselves] appeared to be no better informed." (Certificate, p. 3.)

The officers of the customs are intelligent men, having special qualifications to perform the duties of the offices to which they are appointed. The appraisers are as competent as any class of experts to determine questions as to the origin and manufacture of bags. The general appraisers' opinion, which is by reference made a part of the certificate, and is set out in the appendix to this brief, shows that in their judgment the work of the appraiser who made the examination in this case had been faithfully performed and was satisfactory, which would hardly have been the case if the appraiser was not able to tell the difference between foreign and American bags. And since the importers were themselves ignorant of the distinction, it is only necessary to add that the burden at all times rests with the importers to establish the character of the bags as of American manufacture.

If the importers were not satisfied with the examination of their goods because of the alleged want of sufficient knowledge on the part of the appraiser and examiner, they had an opportunity to present evidence to the board on the hearing of the case at New Orleans. Having failed to do so, they can not impeach the appraisers. (See *United States* v. *China and Japan Trading Co.*, 71 Fed. Rep., 684.) Not having done so, the returns of those officers must be presumed to be correct. (*Erhardt* v. *Schroeder*, 155 U. S., 124, 128; *United States* v. *Rosenwald*, 35 U. S. App., 89, 98; *Arthur* v. *Unkart*, 96 U. S., 118, 122.)

But the importers complain, further, that the appraiser's proceedings are based upon the theory that if there are *any* bags of foreign manufacture appearing in a bale it renders the whole bale dutiable. The Government contends that this is and ought to be the true view of the case. The only bags entitled to free entry are bags of American manufacture. No bags of foreign manufacture are entitled to free entry, and no portion of a bale of bags entitled to free entry may properly, under any right construction of the law, consist of bags of foreign manufacture. It therefore makes little or no difference whether the examination of a bale is complete and exhaustive.

The importer's claim here is founded upon the underlying contention that the bags were, as a matter of fact, of American manufacture. It does not come from them with much force to object to the appraiser's view, that the presence in a bale of any bags of foreign manufacture renders the whole bale dutiable. The fact of the examination and its results, and of the objections to it, show that all the bags were not of American manufacture, and to be entitled to free entry under the plain view of the law and the proper construction of the regulations, it must be established that *all* the bags were of American manufacture.

Furthermore, the objection of the importers to the manner and extent of the appraiser's examination appears plainly illogical to us. It amounts to this argument on their part:

"Your examination, which revealed the presence of some foreign-made bags, was not fair and faithful; it

was not sufficiently extensive; you did not examine as many bales as you should have done, nor examine the bales carefully enough. If you had performed your duty strictly in this regard, further examination would have shown that there were fewer bags of foreign manufacture present in the bales than the examination as made revealed, or even that there were none."

This *reductio ad absurdum* seems to us the necessary conclusion of the importers contentions.

The importers imported in packages bags of foreign and American manufacture, indiscriminately mingled together, which they entered as free of duty on the ground that they were all American-made bags returned to the United States. The statute admits to the United States returned bags of American make alone, and then only on "proof of identity." The rules and regulations of the Treasury Department, made in pursuance of this statute, provide certain means for this "proof of identity." It may be true that the importers furnished documents purporting to comply in form with the requirements of the regulations. Such documents are not, however, conclusive proof unless verified by the appraiser after examination of the bags. (*Dominici* v. *United States*, 72 Fed. Rep., 46.)

As the statute provides that "proof of the identity of such articles shall be made" to entitle them to free admission, if an importation were made prior to or in the absence of any regulation of the Treasury on the subject, that proof, sufficient and satisfactory to the Government, would still have to be submitted. The same rule applies

here, where, although there are regulations, yet the Treasury Department, not being omniscient, could not foresee such a method of importation as we have here, and hence has not framed a regulation to cover it. Certainly the failure to provide an adequate or any regulation can not release from the absolute and plain requirement of the statute.

Suppose that there existed a regulation specifically providing that American-made bags, claimed to be entitled to free entry, should not be imported mixed or invoiced together with foreign-made bags, would the duty of the importers to identify the bags be any greater than it is now?

The whole question, therefore, is one of identity. The statute clearly puts on the importer the onus of proving that his goods are entitled to free entry. Can it be said that when the foreign vendor has made affidavit that the merchandise he is exporting is American bags entitled to free entry, and when the importer has further stated that to the best of his information and belief it is such, and has complied with the regulations which require the submission of documentary proof thereof, the importer has established a *prima facie* case that his goods are entitled to free entry, and that that *prima facie* case is not overturned when the appraiser on actual examination finds that the bags are not all American bags and therefore are not *all* entitled to free admission?

Certainly the burden of proof remains upon the importer when it is shown that, notwithstanding the alleged proofs of identity, the goods are not of American manufacture, and therefore are not identical with those ex-

ported. The appraiser must act on his judgment, and his decision, as we have seen, is final unless reversed in the manner provided by law, viz, upon protest filed, evidence submitted, and decision had thereon by the Board of General Appraisers.

The contention of the importers is, not that in an importation of bags entered by them as American-made bags it was found on examination by the customs officers that some few bags of foreign manufacture had accidentally or without their knowledge been included; but that, when in an importation of bags entered by them as American bags, and which the statute required them to prove were such, it was discovered by the customs officers that there were in each sample bale examined a number of foreign-made bags, it was the duty of the customs officers to examine each individual bag, to separate the foreign-made from the American-made, and to assess the one with the proper duty and permit the remainder to be entered free; in other words, that, notwithstanding a fraud on the revenue has become apparent, whether made knowingly by the importers or otherwise, the burden of proving that the bags were of American origin, and therefore entitled to free entry, was removed from them, by reason of the statements contained in their entry (even though they misrepresented the facts), and because of their compliance on paper with the regulations, and that it thereupon became the duty of the customs officers to prove that the bags were not entitled to free entry. It would seem that the mere statement of this position is its strongest refutation.

It appears, however, that the court, in preparing these questions, goes on the assumption that the burden of proof is on the Government. This is not a criminal proceeding for fraud on the revenue or a suit to forfeit merchandise, in which cases the burden of proof would be on the Government. (*United States* v. *Gooding*, 12 Wheat., 460.) This case on the contrary is a civil suit, brought for the recovery of duties, and the burden of proof is on the importer to substantiate his claims and prove the identity of his merchandise. (*Earnshaw* v. *Cadwalader*, 145 U. S., 247; *Erhardt* v. *Schroeder*, 155 U. S., 124.)

Again, the contention of the importers amounts to the statement that, having imported the bags in suit as American-made bags, and having submitted in good faith the formal proofs, accompanied by their own affidavit that the bags are of American manufacture, they have done *all* that it was incumbent upon them to do, and the bags are entitled to free entry because of the formal compliance with the regulations and the absence of fraud and bad faith, even if foreign bags are included in the bales.

The answer to this position is that section 2 of the customs administrative act of June 10, 1890, requires, without qualification, that invoices of imported merchandise shall contain a correct description of such merchandise, signed by the manufacturer or by the person owning or shipping the same, or by his duly authorized agent. As the foreign manufacturer or shipper is not within our jurisdiction or control, the law provides for the adoption by the domestic consignee or owner of the invoice and statements of the foreign manufacturer and shipper as his own, and he thereupon becomes liable, under section

9 of the said act, for the employment or use of any fraudulent or false invoice, affidavit, letter, or statement, written or verbal, by means of which the United States shall be deprived of lawful duties.

It is suggested that the court of appeals in reference to the examination was dealing with a question of law and not of fact, and therefore in finding as a fact that the examination was not in conformity with law and the regulations of the Treasury Department the court was really expressing a legal conclusion.

The conclusion is, therefore, both on the law as to the invoice under section 2901 and as to the detailed examination of the bales under the regulations, that the proceedings of the appraiser were not invalid as not being in conformity to the law and the regulations.

It is submitted that the first question should, when read in the light of the facts shown in this case, be answered affirmatively.

II.

Section 2910 is as follows:

> When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject.

Literally this section applies only where merchandise of different values is invoiced at an average price. But as the value of the merchandise here involved is not free from controversy, if a literal interpretation is to prevail

without consideration of the object of the statute, it might exclude the present case. But the object of the section is to prevent the indiscriminate mingling of goods of different values but of the same material and description in importations, so as to render difficult the ascertainment of the proportions of the respective goods present, and thus lead to fraud on the revenue.

It nowhere appears from the certificate that foreign and American made bags are not of different values, and as matter of fact the American bags have the advantage in the foreign market for bags, due to their right to free entry, and therefore sell for somewhat more than foreign bags. Consequently it might fairly be claimed that foreign and American made bags in this importation were of different value, and therefore that section 2910 literally applied.

But the inquiry for tariff purposes, where goods of like description and material, but differing as to dutiability or nondutiability, have been invoiced together generally as not dutiable, so much resembles the inquiry as to similar goods of different values invoiced as dutiable at a rate applicable only to one that it is difficult to see any real distinction between them. So far as the purpose and object of the inquiry in each case is concerned, it is identically the same. It is to protect the public Treasury, so that goods which ought to pay a greater amount of duty shall not be allowed to be brought in on payment of a less amount under cover of a grouping with goods properly paying a less amount. It is for this reason, and to prevent the experimenting with the judgment of the appraiser, that both statutes and customs regulations pro-

vide that the importer shall carry out separately, under the appropriate head in his entry, the value of each description of goods paying a different rate of duty. (Rev. Stat., sec. 2785; Customs Reg., 1892, art. 277, 278.) The goods must be invoiced and invoice certified to the same as if dutiable. (*United States* v. *Mosby*, 133 U. S., 273; *Phelps* v. *Siegfried*, 142 U. S., 602.) The present is but a particular application of the principle involved in that broader and more general rule.

As a penalty for disobedience of this rule, and because otherwise it would be practically impossible to prevent partial evasion of the tariff laws in such cases, Congress has provided that in all instances, whether arising honestly or dishonestly, where goods of different dutiability are so invoiced together, all shall pay the duty; that is, the highest duty which any of the goods if separately invoiced would pay.

This whole reasoning holds with equal force as to an invoice of two makes of bags of the same description and material invoiced under one general description, which in reality applies to one make only, but affects the duty to be paid by both. Though Congress directs in words that different values shall be taken notice of, the substantial meaning of the whole sentence is that a difference in *dutiability* shall be taken notice of. Free goods invoiced generally and indiscriminately with dutiable goods of the same description and material is as great if not a greater evil, and is the same sort of an evil, as is an invoicing of higher duty goods with lower duty goods. It is equally with the latter the evil intended to be controlled by section 2910.

An analogous rule of classification for customs purposes to the rule of section 2910 is that which provides, stated very generally, that articles composed of two or more materials shall be assessed at the rate of duty charged upon the component material of chief value. The same general principles are the foundation of both rules.

In cases under section 2910 the whole invoice is to be assessed at the rate which the highest valued goods would pay. Here the question is whether, dutiable goods being found in a bale together with nondutiable goods, the whole bale shall be subject to duty.

What is to be considered the unit for the purposes of the customs laws in examining and appraising? Clearly the bale. The importer buys by the bale and sells by the bale. It can not be said that the bag is the unit. It is not so invoiced or entered. The entry was not of so many thousand bags, but of so many bales of bags. A single bag is of comparatively small value. If each one must be scrutinized, then to carefully examine and appraise the entire three million bags would entail an enormous amount of labor on the customs officers which would cost more than the amount of duty recovered. Such a requirement was never contemplated by the customs laws.

It is submitted that the second question should be answered in the affirmative.

III.

As we have seen, the law carefully provides that proof of identity of the bags sought to be brought into the

United States free of duty shall be furnished. By implication, this provision requires that the bags shall not be so imported, that, as in this case, neither the customs officers nor the owner can identify them. They should be so separated and packed that the customs officers can, with facility, determine what is dutiable and what is not dutiable, and assess the one and pass the other. To hold that it is optional with the importer to bring into the United States dutiable goods and nondutiable goods indiscriminately mixed together, and that the Government, if it wants to collect its duty, must separate the dutiable goods to assess them, is to hold that Congress requires the officers of the customs to do not only an irksome but an unreasonable thing, disadvantageous to the Government, because leading to frauds upon the revenue, and beneficial only to the importer who seeks to commit fraud.

It is claimed on behalf of the United States that, as foreign-made bags were found in the importation, the identity had not been established, and that, therefore, proof not having been furnished that they were entitled to free entry, they must be treated as foreign-made bags. If, then, of the bales examined each showed the presence of foreign-made bags, and as the burden of proof was on the importer to establish the right to free entry which he claimed, the entire consignment was properly held to be subject to duty.

The fact that the importer bought in good faith and imported in good faith is no criterion by which to judge his rights. The question to be determined is the *fact*

whether the bags were American bags or not. The burden of proof is on him, and a *prima facie* case would not be made out until he brought bags apparently the same as those which were taken out of the United States, imported separately from any other bags, and complied with all the regulations of the Treasury Department.

The importer knocks at the door of the United States and seeks free admission. He must establish his right to come in. He can not be first permitted to come in as a matter of right and then compel the United States to prove its right to eject him.

The importer must distinctly specify on his invoice and entry whether the bags are foreign or domestic. Unless clearly proven by him to be domestic, all are dutiable. He can not compel the United States to ascertain for him how many he is entitled to have entered free, nor to identify his particular bags as the bags which someone else exported from the United States and sold to his vendor.

The Government says to the importer, "Bring your American made bags here and I will admit them free of duty." The Government does not say, "Bring your bags here and I will examine them and if I find there are American made bags among them, I will admit those free and assess duty upon the others."

Notwithstanding the statement in the certificate that the importers were "without fraud in the premises," it is apparent that this is an attempt *by someone* to evade the tariff laws by indirection. It is a commonplace of the trade that these methods are often pursued. If the

attempt is successful, many ways will readily be found to cast upon the Government the burden of proving its right to collect its duties.

There is no evidence in the record of fraud on the part of the importers in the present case. But the fact remains that in this case foreign-made bags were returned with others as American-made bags entitled to free entry.

In this connection it is to be noted that the certificate (p. 1) states that "these bags were purchased under a guarantee that they were bags of American manufacture, shipped from the United States, filled with the products thereof, and entitled to free entry on their return to the United States." The very fact that the importers deemed it necessary or proper to take such a guaranty shows that, notwithstanding the certificate states that they were "without fraud in the premises," they had knowledge of the practice prevailing at the time of importing into the United States foreign-made bags under the claim that they were American-made bags entitled to free entry, and protected themselves in this way from loss if the bags purchased by them were found to be not American bags and were assessed with duty.

Such frauds on the revenue resulted in an investigation by the Treasury Department and a breaking up of the practice. The Treasury records show that after this investigation there was a large increase in the importation of dutiable bags and a corresponding decrease in the importation of free bags. When the increase in the dutiable bags is noted, it is not difficult to understand the reason for the decrease in the importation of free bags.

It is to be noticed that the decree of the circuit court required the "collector to direct a reexamination to reliquidate the duties which may be lawfully due" on the merchandise imported. As the merchandise was in fact long ago returned to the importers, it is apparent that this decree is impossible of execution.

It is respectfully submitted that the third question should be answered to the effect that the presence of foreign-made bags in a bale imported as American-made bags subjects the whole bale to duty.

HENRY M. HOYT,
Assistant Attorney-General.
W. J. HUGHES.

APPENDIX.

OPINION OF BOARD OF GENERAL APPRAISERS.

(15070—G. A. 2623.)

Grain bags, returned domestic.

Before the United States General Appraisers at New York, May 21, 1894.

In the matter of the protests, 21861b., etc., of Messrs. Ranlett & Stone et al., against the decision of the collector of customs at New Orleans as to the rate and amount of duties chargeable on certain grain bags, imported per the vessels and at the dates named in the annexed schedule.

Opinion by Sharpe, general appraiser:

These protests cover some three and one-half millions of bags, entered at the port of New Orleans at different times between August 14, 1893, and January 15, 1894.

It appears from the papers that they are empty grain bags made of jute, and of the kind commonly known as centals. They arrive in large quantities, each bale containing 1,000 bags, one of these importations comprising 850,000 bags.

They are claimed variously in the protests—

(1) To be entitled to free entry under paragraph 493, N. T., as manufactures of the United States.

(2) That the bags of foreign manufacture are entitled to free entry under paragraph 649 of the act of March 3, 1883, "which has not been canceled" by the act of October 1, 1890.

(3) That they are free under section 7 of the act of February 8, 1875, which is claimed to be unrepealed.

(4) The claim is also set up that the examination by the appraiser was not fairly and faithfully made, one of the written arguments submitted to the board urging that the examiner's estimate was "not based on facts such as could be derived only from an actual and careful count of the packages bag by bag," and the importations to which the argument applied contained 2,925,000 bags.

The appraiser reports that one of the importers stated that the bags were sold abroad to them as being free of duty, and if found to be of foreign manufacture they (the importers) would hold the foreign exporter. One of the papers submitted in the case also states:

"These bags have been bought with the usual guaranty of free entry into this country from the parties in England, and are therefore supposed to be all bags of American manufacture."

The officers of the appraiser's department strongly assert the fairness and faithfulness of the examinations made, and a very burdensome amount of labor seems to have been done to reach a proper return. From some large invoices 10 per cent of the bales was ordered by the collector. In some invoices of 100 bales and 150 bales, respectively, all were ordered by the collector, and from one invoice of 30 bales 4 were ordered for examination, and the 26 others were subsequently demanded and not delivered by the importer. It does not appear that from some of the invoices the full amount of 10 per cent of the bales was ordered, but it does appear that all the merchandise covered by all the invoices was of the same character and description.

It was admitted that there were bags of foreign manufacture and American manufacture, all indiscriminately mingled together, no attempt being made on entry or afterwards to separate from these enormous totals of goods of the same class those claimed to be relieved from duty, accompanied by the proof establishing such indulgence.

In a recent decision of protest 61329A we have expressed some views in regard to the duty of importers in seeking the benefit of acts or parts of acts relieving merchandise from contribution to the revenue, and we hold similarly in the case now before us. In a carefully prepared paper, in the nature of a brief or argument, by one of the protestants herein for the consideration of the board at the time the oral evidence was taken, the claim is made that the documents required by regulations for the identification of the goods have been furnished, with the exception of those relating to merchandise exported by the Viscount from San Francisco, January 14, 1892, marked B. X. X. In regard to them the protestant states: "These are not available, having apparently been used by others."

There are sundry other lots referred to in the brief where the absence of the identifying certificates is accounted for by the statement that they are "not available" or "not obtainable." It is also admitted in the same brief that sundry other lots are excluded from free entry by reason of their having received drawback on exportation; and these two classes, admittedly excepted from the provisions for free entry, cover many thousands of bags of the importations now under consideration.

These admissions add to the evidence we have *aliunde*, that not only are the so-called returned bags not seen by the foreign exporter, nor by the home importer, who both make oath regarding their manufacture, but the documentary proof of identity required by law is indiscriminately disposed of to anybody who has bags to sell and can find a purchaser in the United States. The brief or argument closes with this statement signed by the importer:

> As I have not personally seen or inspected them (the bags), I am unable to state whether they are all American manufactured or only a portion of the

same. This evidence, I presume, will be furnished by the appraisers who have examined same.

The *onus probandi* of the appellants' claim is thus thrown upon the Government officers, the propriety of which we can not admit.

The admissions above recited do not surprise us, since in the evidence taken before us in G. A. 2448 proof was made that about thirty millions of cental bags are used for the exportation of grain from the Pacific ports, and only a small proportion of the centals thus used are of American manufacture.

The appraiser having examined all these importations and having reported the goods to be of foreign manufacture, duty was assessed by the collector on the bags under paragraph 365, N. T., at the rate of 2 cents per pound.

If this decision had been based on an insufficient examination, the importers might have asked for a reexamination, but they did not do so.

When, however, the protests come before the Board of General Appraisers on appeal, the insufficiency of, or alleged want of fairness in, the examination had no further relation to the decision of the case on the merits. The appellants were then here to prove their allegations, and they had abundant opportunity to do so. To suit their convenience, the testimony was taken at New Orleans, on notice, and all witnesses could be produced. The appellants then had their day in court, and they were there to establish affirmatively, and not by any indirect or negative testimony, the facts entitling their merchandise to free entry. The alleged inexperience of the Government examiners could no longer be criticised, for the door was open for the entrance of all expert witnesses that could be produced. The testimony introduced failed to sustain the allegations of fact made in the protest and corroborated the returns of the examining officers, which we find to be true.

We hold the provisions of the acts of March 3, 1883, and of February 8, 1875, under which alternative claims are made, are no longer in force. The facts proved and the claims made herein are in many points similar to those considered in passing upon those covered by protests 18225 *et al.* from San Francisco, and we refer to the views there held as applicable herein.

We find that these several protests have not been sustained, and we affirm the decision of the collector.

WILBUR F. LUNT,
GEORGE H. SHARPE,
Board United States General Appraisers.

21861-B-476, Ranlett & Stone, *Engineer*, October 10, 1893.
21862-479, Ranlett & Stone, *Vesta*, October 31, 1893.
21863-480, Ranlett & Stone, *Legislator*, October 3, 1893.
21965-481, Ranlett & Stone, *Assaye*, November 11, 1893.
22185-485, Ranlett & Stone, *Traveller*, December 28, 1893.
22186-489, Ranlett & Stone, *Pallas*, January 5, 1894.
22187-490, Ranlett & Stone, *Engineer*, January 17, 1894.

The following are the opinions of the Board of General Appraisers referred to in the foregoing opinion:

(14726—G. A. 2448.)

Free entry of foreign-made cental (grain) bags—Act of February 8, 1875, not in force.

Before the United States General Appraisers at New York, February 3, 1894.

In the matter of the protest, 55275a-12973, of Percy Kent against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain grain bags imported per *St. Enoch*, June 28, 1893.

Opinion by SHARPE, general appraiser:

The protestant imported into the port of New York 75 bales of grain bags, the entry being made June 28, 1893, each bale being understood to contain 1,000 bags.

The merchandise was returned by the appraiser as empty grain bags bearing evidence of foreign manufacture and of having been used in the transportation of American products.

On this report duty was assessed by the collector thereon at 2 cents per pound, under paragraph 365, there being no dispute that the bags are made of burlaps and are imported empty.

The protest claims—

(1) That the bags are entitled to free entry under paragraph 493 as bags of American manufacture, exported filled with American products; and

(2) That if not free under said paragraph of the present act they are entitled to free entry under section 7 of the act of February 8, 1875, providing that bags other than of American manufacture in which grain shall have been actually exported from the United States may be returned empty to the United States free of duty under regulations of the Secretary of the Treasury. The alternative claim is reinforced by the contention that the act of February 8, 1875, is still in full force and effect, not having been repealed by any statute of the United States.

The greater part of the bags in which grain is exported from the United States leaves the country by the ports of the Pacific coast, and in the hearing before us proof was made that about 30,000,000 are used for the exportation of grain. About 5,000,000 of bags are made in California, and we have evidence to show that, during the year 1892, 30,000,000 of cental bags were exported from Calcutta to the Pacific ports of the United States, and about 4,000,000 to the port of New Orleans.

The number of second-hand bags, or returned cental bags, imported into the ports of the Eastern coast—New York, New Orleans, Boston, Baltimore, and Philadelphia—appears to be not less than 10,000,000 annually.

It may thus be reasonably supposed that of the bags returned empty to this country, which have been previ-

ously exported filled with grain, the greater proportion are of foreign manufacture, and, on the hearing, it was not denied that about 80 per cent of the importation under consideration were foreign-made bags.

On their return to this country the bags of foreign and American manufacture are brought in, indiscriminately mingled together in the same bale, leaving to the customs officers the tedious and laborious duty of separating them in order to establish the rights of the Government, and involving an expense perhaps equal to the duties to which the Government may be entitled.

It also appeared on the hearing that many bags on which drawback is claimed in San Francisco, as being made in this country from imported material on which duty has been paid, have a continuous black stripe an inch wide to indicate claim for drawback, and it may be well believed that such a mark would not be omitted from merchandise entitled to a privilege over other merchandise of the same kind.

There was little conflict upon the question of fact, but on the hearing the importer's counsel relied mainly upon the argument that section 7 of the act of February 8, 1875, remains in force, and on that contention briefs were submitted for the importer and also for the collector.

It is claimed for the appellant that paragraph 493 of the act of 1890 is a substitute for paragraph 649 of the act of 1883, and that the latter act would have operated as a repeal of section 7 of the act of 1875 as effectively as the act of 1890.

It is argued that the Treasury Department, however, in 1884, in article 381 of the regulations of that year, provided for the free entry of bags other than those of American manufacture in which grain shall have been actually exported from the United States, and by a circular of October 20, 1890 (Synopsis 10291), the Department recognized the act of 1875 as being in force after the passage of the act of 1890.

Further recognition of section 7 of the act of 1875 by the Department, after the passage of the act of 1883, is claimed, from the fact that in a document published by the Department entitled "Tariffs of 1883 and 1890 on imports into the United States," there was included in brackets with a subdivisional heading the language of the proviso to said section with a reference to the section and act.

However strong this implied construction may be, we find that later the question was distinctly presented to the Department, which, on the date of August 22, 1893 (Synopsis 14281), used the following language:

"Bags of foreign manufacture, exported with American products, will be subject, on being returned to the United States, to the same duty as if they had not been previously imported, it being held by this Department, in accordance with an opinion rendered on the 20th ultimo by the Attorney-General, that section 7 of the act of February 8, 1875, which provided for the free entry of such returned foreign bags, is repealed by the act of October 1, 1890."

The appellants relied upon the case of Russell *v.* Worthington (23 Fed. Rep., 248), where in March, 1885, or after the passage of the act of 1883, a proviso to section 4 of the act of 1875 was held to be in force. But an examination of this case shows that the proviso was considered by the court with reference to an existing treaty, and not otherwise, and the proviso was held to be in force by reason of the treaty.

We hold, in accordance with previous opinions of the board, and with the language of the court in the case of Straus and others (46 Fed. Rep., 522), that the act of 1890 is a substitute for all prior tariff legislation, so far as it lays a duty upon imported articles, and that paragraphs 365 and 493 cover all merchandise of the description under consideration that may be imported into the United States since the passage of the act.

We find as facts—

(1) That the bags had been used in the exportation of American grain, and were imported after such use as second-hand bags, being for the most part known as cental bags.

(2) That such second-hand bags, or cental bags, are made in very large quantities in foreign countries, and to a comparatively limited extent within the United States.

(3) That two bales, taken and agreed upon as representative bales, having been carefully examined bag by bag, were found to contain, out of the 2,000 bags, 1,613 of foreign manufacture and 387 of American manufacture.

As a result of the foregoing holding and findings, we affirm the action of the collector upon such bags as are of foreign manufacture, and we sustain the protest on such as are of American manufacture, and we authorize a reliquidation upon the classification of all the bales of the importation according to the proportions of foreign and American bags found in the two bales referred to.

(15033—G. A. 2610.)

Free entry of returned American grain bags.

Before the United States General Appraisers at New York, May 2, 1894.

In the matter of the protest, 18225-8*b*, of Balfour, Guthrie & Co., and Calton, Bell & Co., against the decision of the collector of customs at San Francisco, Cal., as to the rate and amount of duties chargeable on certain grain bags, American manufacture, imported per *British Isles*, March 15, 1892; *Manx King*, July 26, 1892, and *Eastcroft*, August 23 and 24, 1892.

Opinion by SHARPE, general appraiser.

These protests cover four importations at San Francisco of bags made of burlaps, which had been exported filled with American products, and are returned empty.

They are partly of American and partly of foreign manufacture. They are claimed to be of American manufacture and entitled to free entry under paragraph 493 of the present tariff; and the contention is also made that bags in which grain shall have been actually exported from the United States are entitled to be returned empty to the United States free of duty, under regulations prescribed by the Secretary of the Treasury, under section 7 of the act of February 8, 1875. The provisions of this section apply to bags other than of American manufacture.

There is a further claim in the protests that the Untied States appraiser did not diligently and faithfully examine and inspect such packages as were designated by the collector. This allegation is specifically denied by the appraiser, who reports circumstantially some of the methods of his examination and the acquiescence of the importers' representatives in the results reached.

No reexamination having been asked of or ordered by the collector, we must decline to allow any force in this claim.

In a case recently before us, arising at New York on a protest of Percy Kent (55275 *a*), the claim was made, as in this case, that foreign-made bags are entitled to free entry when returned to the United States, after being used for the exportation of grain, for the reason that section 7 of the act of February 8, 1875, is unrepealed. We there held the contrary of this contention, and we so hold in this case.

In the examination of the merchandise covered by invoice 3232, by the ship *British Isles*, it was found that the invoice had stated that 21,690 of the bags had been exported by the British ship *Aeolus*. This was a principal step to the identification of the bags, proof of which is required under the law and regulations. The examination showed that the 50 bales under consideration had

all been exported by the *Crown of Denmark*, and none by the *Aeolus*. The identification, therefore, utterly failed, and not only was no attempt made to supply the failure, but the appraiser reported that upon this failure being made known to the protestants they notified the appraiser's department of their intention to pay duty on the importation, and the examination thereupon ceased. When the examination of the merchandise covered by the other invoices was reached, the appraiser reported that the protestants admitted that the bags were not all of American manufacture, and that they would be unable to prove them not to be foreign made. Several experts in San Francisco testified from the examination made that the percentage of foreign-made bags was very largely in excess of those of American manufacture, and the bags appear to have been indiscriminately mingled together, without any attempt on the part of the importer to separate them or to designate those claimed to be free. Under these circumstances duty was assessed upon the entirety of the importation.

The customs officers claimed authority for such decision under a direction given by the Treasury Department (Synopsis 10098) in July, 1890, where, upon a proposed importation of mixed cargoes of anthracite and bituminous coal in such a mingled condition as to render it impracticable to separate the free from the dutiable coal for the purpose of the accurate weighing of each kind, the collector was instructed that the whole cargo should be treated as bituminous and assessed for duty.

We also find that December 28, 1868, an importation was made into the port of Rochester of sundry bales of rags, as containing rags for the manufacture of paper, it being found that the bales contained not less than 40 per cent of woolen rags. The law imposed a duty of 12 cents per pound on woolen rags, and admitted free such as were composed of cotton and linen and were intended for the manufacture of paper.

On this state of facts the honorable Secretary of the Treasury instructed the collector as follows:

"If you are satisfied that there was no intention on the part of the importers to conceal the dutiable rags by mingling them with others free of duty, you will not hold them for condemnation, but will allow the parties to separate such as are dutiable from such as are not so, and make entry accordingly."

These instructions of the Department are in harmony with the determination of the lawmaking power upon cognate subjects, as by section 2912 of the Revised Statutes Congress enacted as follows:

"When wool of different qualities is imported in the same bale, bag, or package, it shall be appraised by the appraiser to determine the rate of duty to which it shall be subjected, at the average aggregate value of the contents of the bale, bag, or package; and when bales of different qualities are embraced in the same invoice at the same prices whereby the average price shall be reduced more than ten per centum below the value of the bale of the best quality, the value of the whole shall be appraised according to the value of the bale of the best quality; and no bale, bag, or package shall be liable to a less rate of duty in consequence of being invoiced with wool of lower value."

Section 2910, R. S., also provides:

"When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest-valued goods in such invoices are subject."

Bags made of burlaps are dutiable, except such as are described in paragraph 493, and we hold it to be the duty of all persons bringing in goods claimed to be free, out of a class otherwise dutiable, to prove affirmatively the facts which constitute the exemption. We hold that they

should separate and designate such merchandise accompanied by the evidence acquired by law, and we decide that in these cases the protestants failed to meet the requirements of law and regulations.

The decision of the collector in each case is affirmed.

(15036—G. A. 2613.)

Free entry—Returned American flour bags.

Before the United States General Appraisers at New York, May 5, 1894.

In the matter of the protest 61329*a*-18369, of H. Brewer & Bro., against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain flour bags, imported per *Ludgate Hill*, August 15, 1893.

Opinion by SHARPE, general appraiser:

This was an importation of 50,000 bags, in 50 bales of 1,000 each, by the steamship *Ludgate Hill*, August 15, 1893. They were returned by the appraiser as bags for grain made of burlaps, and on the invoice that officer further reported them to be "empty American-made flour bags covered by circular No. 21. Brands do not agree with the attached statement."

This further return established the fact that the merchandise is jute bags of American manufacture, known commercially as 140-pound flour bags. The collector decided that as the brands on the bags did not agree with the brands on the exported bags, which the importers claimed were the bags returned by this importation, the latter were subject to duty at the rate of 2 cents per pound.

The protest claimed the bags to be free under paragraph 493, N. T., alleging—

"That the proofs required by law and regulation as a prerequisite to admission free of duty have been presented, and are now in your [the collector's] custody, for the greater part of said bags."

There is no dispute that these bags are liable to the duty assessed by the collector unless they are released therefrom by the terms of paragraph 493, which provides for the free entry of bags and other vessels of American manufacture.

"But proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury. * * * *Provided*, That this paragraph shall not apply to any article on which an allowance of drawback has been made, the reimportation of which is hereby prohibited, except upon the payment of duties equal to the drawbacks allowed."

To establish the identity required by law, and which, in the language of the regulations, should be proved beyond any reasonable doubt, a list of brands was furnished by the importer, with the number of bags bearing each brand, exported by four several vessels, to wit, by the *Durham City*, 19,315; by the *Boston City*, 12,524; by the *Charlotte*, 18,100, and by the *Ariadne*, 61, thus accurately accounting for the whole importation of 50,000 bags.

But when the contents of one bale came to be examined the bale was found to contain only 13 brands which were included in the invoice list, and 152 brands which were nowhere on the invoice list. In other words, there was prima facie identification of 8 per cent of the contents of this bale, and conclusive disproof of the identity of 92 per cent thereof.

No attempt was made to supply this failure of evidence before the examining officers, nor again before the board on the hearing of the appeal, notwithstanding the fact that by Synopsis 13715 the importer is allowed one year from the date of importation to furnish the proofs required by regulations, and the hearing was held several months before the expiration of the period. No postponement was asked in order to supplement the evi-

dence, but the importer submitted his case on the official papers and reports, and we may fairly conclude that no proof of identity could be supplied other than the defective and misleading papers accompanying the entry.

Indeed, we know from evidence taken in other cases that the foreign exporter does not see the bags which he returns to this country with his affidavit, on information and belief that they are truly of the manufacture of the United States; and the importer's affidavit, on information and belief, to the same effect on entry, rests upon nothing but the oath of the foreign exporter. This practice obtains in regard to all bags returned to this country.

We know that grain bags are emptied of their contents on the docks in a foreign country, and they may, therefore, be assembled and identified; but in the case of flour bags, which are the subject of this inquiry, we know that they follow their contents into the interior, and are widely dispersed, and it would seem contrary to reason to believe that they are again gathered together to any considerable extent. In this case we are asked to give credence to the theory that 19,315 flour bags exported by one vessel, 12,524 by another, and 18,100 by a third were reassembled so as to reenter the United States in lots composed of their original associates.

Upon the failure of proof of identity above set forth, and upon the return by the examining officers, the collector assessed duty upon the whole importation, and we think he was right in doing so. We hold it to be the duty of the importer to make affirmative proof of a state of facts relieving his merchandise from duty, to which it would otherwise be subjected, and that he should segregate from the same class of goods such portions as are claimed to be free. He does not perform his duty by throwing upon the hands of the examining officers importations enormous in bulk and number, containing goods

that are free and dutiable indiscriminately mingled together, and requiring an army of officials to separate them. If segregated, the appraiser's subordinates could make such an inspection as is contemplated by law to verify the declarations made on entry; and the law does not contemplate the individual handling of the countless millions of articles of imported merchandise.

Such a method of administration, if made necessary, would require the expenditure of the revenue in the effort to collect it, or would entail unendurable and obstructive delays in the management of the public business.

In a case recently before us covering protests 18225–8 *b*, from San Francisco, we have cited some authorities from decisions of the Treasury Department, which cover this case, and to which we now refer, and for the reasons stated herein, and in such G. A. decision, we affirm the action of the collector.

REVISED STATUTES, SECTION 2901.

The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and

forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
RANLETT & STONE.
No. 20.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellees imported at the port of New Orleans, from Liverpool, England, by several vessels, in 1893 and 1894, 2,925,000 grain bags, known as cental bags. The merchandise was entered free of duty under paragraph 493 of the act of October 1, 1890 (26 Stat., 567–603), as bags of American manufacture returned to the United States. Paragraph 493 is as follows:

> Articles the growth, produce, and *manufacture of the United States*, when returned after having been

exported, without having been advanced in value or improved in condition by any process of manufacture, or other means; casks, barrels, carboys, *bags*, and other vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; * * * *but proof of the identity of such articles shall be made*, under general regulations to be prescribed by the Secretary of the Treasury; and if any such articles are subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. * * *

The general regulations prescribed by the Secretary of the Treasury under this paragraph contain the following provisions:

CUSTOMS REGULATIONS, 1892.

ART. 331. Articles of the growth, produce, and manufacture of the United States, exported to a foreign country and returned without having been advanced in value or improved in condition by any process of manufacture or other means, and upon which no drawback or bounty has been allowed, are entitled to entry free of duty, but this privilege does not extend to articles exported in bond from a manufacturing warehouse and afterward returned to this country. The exportation must be bona fide and not for the purpose of evading any revenue law.

* * * * *

If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, * * * and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation there shall be required, in addition to the declaration, a certificate from the collector and the naval officer, if any, of the port where the exportation was made showing the fact of exportation from that port.

* * * * *

ART. 332. To guard against fraud, and to insure identity, the collector shall require, in addition to proof of clearance, the production of a statement, certified by the proper officer of the customs at the foreign port from which the reimportation was made, and authenticated by the consul of the United States, that such merchandise was imported from the United States in the condition in which it is returned, and that it has not been advanced in value or improved in condition by any process of manufacture or other means.

* * * * *

ART. 335. Casks, barrels, carboys, bags, and vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes, are free of duties, but in case drawback has been allowed upon the exportation of any such articles, they shall on importation be subject to a duty equal to the drawback. Proof of the identity of such articles must be made, and if any of them were subject to internal tax at the time of exportation, such tax shall be proved to have

been paid before exportation and not refunded, or duty will accrue.

* * * * *

ART. 336. Before entry the following proof shall be required by the collector:

First. A certificate as follows from the shipper, in triplicate, attested by a consul or other proper officer authorized to take affidavits, as follows:

(Cat. No. 773.)

I hereby certify, under oath, that, to the best of my knowledge and belief, the * ——— hereinafter specified, are truly of the manufacture of the United States,† ——— or were exported from the United States, filled with ——— and that it is intended to reship the same to the port of ———, in the United States ‡ ——— on board the ———, now lying in the port of ———. I further certify that, to the best of my knowledge and belief, the actual market value of the articles herein named, at this time and in the form in which the same are to be exported to the United States, is as follows § ———.

——— ———.

Sworn to before me, this —— day of ———, 18—.

——— ———.

* Name the articles.

† If the packages are empty insert statement of the facts, as "and were exported from the United States filled with the produce of that country."

‡ If the packages contain foreign merchandise insert "filled with" and a declaration of the merchandise they contain.

§ This blank is to be filled only when the merchandise contained in the packages is subject to a duty ad valorem.

* * * * *

Second. A declaration in the entry by the importer of the name of the exporting vessel, the date of the ship's manifest, and the marks and numbers on the articles for which free entry is sought. If the exportation was made by railroad, the waybill may be substituted as evidence for the manifest. The marks and numbers should be such as to prove beyond any reasonable doubt the identity of the articles with those entered on the outward manifest. * * *

Third. An affidavit by the importer, attached to the entry, that the articles mentioned therein are to the best of his knowledge and belief truly and bona fide manufactures of the United States, or were bags exported therefrom filled with grain.

* * * * *

Fifth. Verification, after examination, by the appraiser with an endorsement stating whether the articles are of domestic or foreign manufacture.

Such bags and other coverings exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the shipper's manifest upon which they are exported.

* * * * *

The course of the transactions in the case was as follows:

Upon the arrival in this country of the respective shipments of the merchandise, free entry was made by the importer and certain evidence furnished regarding the right to free entry and the character of the goods. Samples of the respective invoices were then sent to the appraiser's office and examined as follows:

From one entry of 600 bales, 70 were ordered to the appraiser's store and 18 of that number were opened by him;

Of another entry of 650 bales, 33 were ordered to the store and 19 were opened;

Of a third entry of 325 bales, 38 were ordered to the store and 13 were opened;

Of a fourth entry of 850 bales, 85 were ordered to the store and 16 were opened;

Of a fifth entry of 350 bales, 21 were ordered to the store and 14 were opened;

Of a sixth entry of 100 bales, 100 were ordered to the store and 10 were opened;

And of a seventh entry of 100 bales, 100 were ordered to the store and 10 were opened.

The examination of the bales opened at the appraiser's stores was made by the appraiser, assisted by an examiner. From the examination thus made the appraiser reported as to *each* importation that the bales contained bags of foreign manufacture, subject to duty, and thereupon the collector, being authorized thereto by the Treasury Department, at the request of the importers, made impost entries, assessing duty at the rate of 2 cents per pound on the entire consignment, under paragraph 365 of the act of 1890, as "bags for grain made of burlap." (Rec., p. 24.) The importers protested against the "decision, liquidation, and rate and amount of duties assessed," and carried the matter to the Board of General Appraisers, which affirmed the action of the collector. (See opinion by Sharpe, general appraiser, Rec., p. 50.)

The protests of the importers against the collector's decision recognized, inferentially, that the bags might be of foreign manufacture. The protests also recognized the examination by the appraiser, but claimed

that the examination was not fairly and faithfully performed, and that the assessment was incorrect. The protests do not specifically complain of the *illegality* of the examination, and base their final objection to the proceedings upon the contention that section 2910 of the Revised Statutes, which provides for the assessment of duty upon goods of different values in the same invoice at the rate to which the highest-valued goods are subject, does not apply to a mixture of foreign and American bags, on the ground that such goods are of one value. (Rec., p. 6, *et seq.*)

The Board of General Appraisers (who had previously passed upon several cental bag cases, and were conversant with the subject and had knowledge of frauds which had been perpetrated) sustained the action of the collector in a carefully prepared opinion. From their decision the importers applied for a review to the circuit court, which, without taking any additional testimony and without rendering any opinion, reversed the decision of the Board, and entered a decree (Rec., p. 55) holding "that the examination heretofore made of said bales of bags is void and not in conformity to law or the regulations of the Treasury Department, and any liquidation of the duties based on said examination is illegal and void," and directing "that the liquidation of the duties heretofore made be set aside, and money received from Ranlett & Stone as duties be refunded as aforesaid; and the court doth further order and decree that the collector direct reexamination of said bales of bags to be made according to law, and on such reexami-

nation to reliquidate the duties which may be lawfully due thereon."

On appeal by the United States from the decree of the circuit court, certain questions were certified to this court by the circuit court of appeals.

Upon the argument and submission of the case, this court directed that a writ of certiorari issue to bring the entire record before it.

ARGUMENT.

I.

BURDEN OF PROOF.

The respective claims.

The underlying claim of the importers in this case is that, having brought to the United States certain bags sold to them as American bags entitled to free entry; having produced the certificates and certain other papers required by the Treasury regulations, and having entered the goods as American bags entitled to free entry, they have established a *prima facie* case, which shifts the burden of proof from them and puts upon the Government the onus of proving that the bags are not American made, and are not, therefore, entitled to be admitted free of duty.

The Government contends, on the other hand, that the burden of proof in such a case is always on the importer; that the general presumption is that all goods brought into the United States from abroad are subject to duty; that the particular presumption in this case is that the

bags, being brought to the United States from abroad, are of foreign manufacture and therefore subject to duty; that, consequently, all the facts necessary to show, beyond any doubt, that they are entitled to free entry must be proved by the importer; and that the burden of proof never shifts. The importer, it says, brings his goods to the United States and knocks at the door, asking admission; he can not, under any circumstances, be permitted to enter as a matter of right, and then compel the United States to prove its right to eject him.

The importers (Rec., p. 14) claim that they "have complied with the law and Treasury regulations as to the production of the sworn statements of the English shippers as to the origin of the goods, and certificates of the Pacific coast customs authorities as to their exportation therefrom filled with wheat, which *prima facie* evidence of their being of the manufacture of this country has not been disproved."

But even admitting, for the purpose of the argument, that in this case there was, by the production of the various papers required by the Treasury regulations, a *prima facie* case established, going to prove that the articles for which free entry was claimed were, as they were entered, *all* American-made bags, that *prima facie* case was overturned the moment the examiner, upon an inspection of the bags, ascertained that there were foreign-made bags among them. Consequently, if the burden of proof shifted from the importers, where it was initially, by their production of the papers referred to, it again shifted when foreign-made bags were found in the shipment.

It will not do to claim, in this position of the case, that the examiner and the appraiser who found the foreign-made bags, were incompetent, or that they did not examine a sufficient number of bales in each shipment; because the contention of the importers is not that the bags selected by the examiner from the bales were in reality American-made bags, but that if a further examination of the bales had been made a larger proportion of American-made bags would have been found than were reported by the examiner to the appraiser.

In other words, the position of the importers is that the examiner and appraiser should either have admitted all the bags free, or else, having discovered foreign bags therein, have examined every bag in at least one bale from each ten, in order to ascertain how many foreign and how many American bags they contained, and apply the proportions thereof to the entire invoice, so that the American bags might be admitted free and duty assessed upon the remainder. The claim was *not* that the bales, notwithstanding the examination disclosed the presence of what the examiner and appraiser claimed to be foreign bags therein, were, nevertheless, composed entirely of American bags as entered.

The claim that the examination was not according to the customs regulations.

The presumption is in favor of the sufficiency and regularity of official action.

It is nowhere shown that the appraiser or the examiner failed to comply with any regulation of the Treasury Department. The presumption and the fact is that they

did comply with every regulation. (Rec., pp. 21, 22, 23, 26.)

When power or jurisdiction over a subject-matter is delegated to a public officer, his official acts done are presumed to have been rightly done, and are, in general, binding and valid. (*Belcher* v. *Linn*, 24 Howard, 508, 522; *Origet* v. *Hedden*, 155 U. S., 228; *Muser* v. *Magone*, 155 U. S., 240.)

The regulations (art. 336, cl. 5) require "verification after examination by the appraiser," which shows, of course, that the proof offered by the importer is not to be accepted as conclusive, but that the appraiser is directed to scrutinize the character of the importation. The appraiser, in the first instance, determines the character of the article described; if the formal proof misdescribes or represents incorrectly the character of the importation, either in the invoice or the entry, payment of duties can not, therefore, be avoided. Where the misdescription is fraudulent, it is cause for forfeiture and constitutes a crime under section 9 of the customs administrative act.

It is the duty of the appraiser "to *ascertain*, estimate, and appraise (any invoice or affidavit or statement * * * to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities and actual market value or wholesale price of every of them, as the case may require." (Sec. 10, customs administrative act of June 10, 1890.)

Consequently the appraiser may correct the misdescription or disregard it, so as to perform his duty as required by law. Unless appraisers have this right the grossest frauds may be committed by the importer with perfect impunity, and if they have this right, as clearly they must, it follows that questions as to the nature of the produce imported, and its consequent classification in the invoice and entry, are questions of fact within the jurisdiction of the appraiser. (*Belcher* v. *Linn*, 24 How., 508, 522.) These considerations are as applicable to appraisals under the special conditions of the free-entry regulations as to appraisals generally.

It can not be said that the purpose of such provisions is to be restricted to appraisal to determine *value;* the words used in the various acts on the subject are the "inspection" or "examination" of merchandise, and "ascertain" refers to character and quality as well as value, the foundation for the whole scheme of regulation being based on the requirement that all the statements of invoice and entry, relating to the character of the goods as well as to value, shall be in all respects true. All the facts, as they really exist, must be shown.

The officers of the customs are intelligent men, having special qualifications to perform the duties of the offices to which they are appointed. The examiner who made the actual examination in this case was, as the record (p. 32) shows, fully competent to determine questions as to the origin and manufacture of the bags. The general appraisers' opinion (Rec., p. 42) shows that, in their judgment, the work of the appraiser was faithfully performed and was satisfactory, which would hardly have

been the case if the appraiser and the examiner were not able to tell the difference between foreign and American bags. And since the importers were themselves ignorant of the distinction (Rec., p. 40), it is only necessary to add that the burden at all times rests with the importers to establish the character of the bags as of American manufacture.

If the importers were not satisfied with the examination of their goods because of the alleged want of sufficient knowledge on the part of the appraiser and examiner, or otherwise, they should have applied for a reexamination. This they did not do; nor did they take advantage of the opportunity to present evidence to the board on the hearing of the case at New Orleans. (Rec., p. 43.) Having failed to do so, they can not impeach the appraisers. (See *United States* v. *China and Japan Trading Co.*, 71 Fed. Rep., 684.) Not having done so, the returns of those officers must be presumed to be correct. (*Erhardt* v. *Schroeder*, 155 U. S., 124, 128; *United States* v. *Rosenwald*, 35 U. S. App., 89, 98; *Arthur* v. *Unkart*, 96 U. S., 118, 122.)

The action of the collector is not based directly upon the report of the examiner. The examiner reports to the appraiser, whose duty it is to determine the question of the character of the goods. The statement of the examiner, therefore, that he found from 75 to 86 per cent foreign-made bags in the shipment (Rec., pp. 30 and 34) would not justify the collector in assessing duty upon a portion of the bags and admitting the remainder free.

It was for the appraiser to report to the collector, and upon that report the collector had to base his action. The

appraiser reported that he found the shipment to contain bags of foreign manufacture, and that the importation was dutiable at 2 cents per pound under paragraph 365. (Rec., pp. 21 and 26.)

It is to be noted that "all of the proofs required" by the Government were not submitted. The law requires proof of the actual identity of the bags, and this must be shown even in the absence of Treasury regulations.

The regulations, however, provide certain means of identification.

Article 335 provides "proof of the identity of such articles must be made," and article 336, section *fifth*, requires "verification, after examination, by the appraiser with an endorsement stating whether the articles are of domestic or foreign manufacture. Such bags and other coverings exported to be returned should, when practicable, be marked or numbered in order that they may be identified on their return."

The law, therefore, and the regulations specifically provide for the identificaton of the bags as bags which were exported from the United States and returned thereto. There could not have been a compliance with the statute and the regulations if the identity was not established. To show this identity, the certificate of the customs officer at the port of export, and the other papers required by the regulations, all of which were submitted by the importers, would not necessarily be conclusive. The certificate of the customs officers at the port of export would not be conclusive on Government if it were afterwards shown that foreign bags were exported from

the United States and the certificate issued upon the claim that they were of American manufacture. The law required an examination of the merchandise itself also.

But the importers complain, further, that the appraiser's proceedings are based upon the theory that if there are *any* bags of foreign manufacture appearing in a bale it renders the whole bale dutiable. The Government contends that this is and ought to be the true view of the case, excepting only the case of the accidental presence of a few foreign bags. The only bags entitled to free entry are bags of American manufacture. No bags of foreign manufacture are entitled to free entry, and no portion of a bale of bags entitled to free entry may properly, under any right construction of the law, consist of bags of foreign manufacture. It therefore makes little or no difference whether the examination of a bale is complete and exhaustive.

The importer's claim here is founded upon the contention that the bags were, as a matter of fact, of American manufacture. It does not come from them with much force to object to the appraiser's view, that the presence in a bale of any considerable quantity of bags of foreign manufacture renders the whole bale dutiable. The fact of the examination and its results, and of the objections to it, show that all the bags were not of American manufacture, and to be entitled to free entry, under the plain view of the law and the proper construction of the regulations, it must be established that *all* the bags, or at least substantially all, were of American manufacture.

Furthermore, the objection of the importers to the

manner and extent of the appraiser's examination appears plainly illogical to us. It amounts to this argument on their part:

"Your examination, which revealed the presence of some foreign-made bags, was not fair and faithful; it was not sufficiently extensive; you did not examine as many bales as you should have done, nor examine the bales carefully enough. If you had performed your duty strictly in this regard, further examination would have shown that there were fewer bags of foreign manufacture present in the bales than the examination as made revealed, or even that there were none, as we claim."

This *reductio ad absurdum* seems to us the necessary conclusion of the importers' contentions.

The importers imported in packages bags of foreign and American manufacture, indiscriminately mingled together (Rec., p. 42), which they entered as free of duty on the ground that they were all American-made bags returned to the United States. The statute admits to the United States returned bags of American make alone, and then only on "proof of identity." The rules and regulations of the Treasury Department, made in pursuance of this statute, provide certain means for this "proof of identity." It may be true that the importers furnished documents purporting to comply in form with the requirements of the regulations. Such documents are not, however, conclusive proof unless "verified" by the appraiser after examination of the bags. (*Dominici* v. *United States*, 72 Fed. Rep., 46.)

And the "proof of identity" must necessarily mean not only identity with the bags exported, but identity as

American-made bags. The statute and regulations proceed on the assumption that the bags exported are American-made bags. They are not always such.

As the statute provides that "proof of the identity of such articles shall be made" to entitle them to free admission, if an importation was made prior to or in the absence of any regulation of the Treasury on the subject, that proof, sufficient and satisfactory to the Government, would still have to be submitted. The same rule applies here, where, although there are regulations, yet the Treasury Department, not foreseeing such a method of importation as we have here, had not framed a regulation to cover it. Certainly the failure to provide an adequate or any regulation can not release from the absolute and plain requirement of the statute.

Suppose that there existed a regulation specifically providing that American-made bags, claimed to be entitled to free entry, should not be imported mixed or invoiced together with foreign-made bags, would the duty of the importers to identify the bags be any greater than it is now?

The question, therefore, is one of identity as American-made bags. The statute clearly puts on the importer the onus of proving that his goods are entitled to free entry. Can it be said that when the foreign vendor has made affidavit that the merchandise he is exporting is American bags entitled to free entry, and when the importer has further stated that to the best of his information and belief it is such, and has complied with the regulations which require the submission of documentary proof thereof, the

importer has established a *prima facie* case that his goods are entitled to free entry, and that that *prima facie* case is not overturned when the appraiser on actual examination finds that the bags are, substantially, foreign bags, and therefore are not *all* entitled to free admission?

Certainly the burden of proof is upon the importer when it is shown that, upon the examination of the articles themselves, notwithstanding the alleged proofs of identity, the goods are not of American manufacture, and therefore are not identical with those exported, or if identical with those exported, are still not of American manufacture. The appraiser must act on his judgment, and his decision, as we have seen, is final unless reversed in the manner provided by law, viz, upon reappraisement or upon protest filed, evidence submitted, and decision had thereon by the Board of General Appraisers.

The contention of the importers is not solely that in an importation of bags entered by them as American-made bags it was found on examination by the customs officers that some few bags of foreign manufacture had accidentally or without their knowledge been included; but, as an alternative, that, when in an importation of bags entered by them as American bags, and which the statute required them to prove were such, it was discovered by the customs officers that there were in each sample bale examined a substantial number of foreign-made bags, it was the duty of the customs officers to examine each individual bag, to separate the foreign-made from the American-made, and assess the one with the proper duty and permit the remainder to be entered free; in other words, that, notwithstanding a fraud on the revenue has become

apparent (even if not perpetrated intentionally by the importers), the burden of proving that the bags were of American origin, and therefore entitled to free entry, was removed from them by reason of the statements contained in their entry (although they misrepresented the facts), and because of their compliance on paper with the regulations, and that it thereupon became the duty of the customs officers to prove that the bags were not entitled to free entry, and notwithstanding the fact that this is not a forfeiture proceeding, but a suit to recover duties paid. It would seem that the mere statement of this position is its strongest refutation.

The lower courts, however, seem to have assumed that the burden of proof is on the Government. This is not a criminal proceeding for fraud on the revenue or a suit to forfeit merchandise, in which cases the burden of proof would be on the Government. (*United States* v. *Gooding*, 12 Wheat., 460.) On the contrary, it is a civil suit, brought for the recovery of duties, and the burden of proof is on the importer to substantiate his claims and prove the identity of his merchandise. (*Earnshaw* v. *Cadwalader*, 145 U. S., 247; *Erhardt* v. *Schroeder*, 155 U. S., 124.)

Again, the contention of the importers amounts to the statement that, having imported the bags in suit as American-made bags, and having submitted in good faith the formal proofs, accompanied by their own affidavit that the bags are of American manufacture, they have done *all* that it was incumbent upon them to do, and the bags are entitled to free entry because of the formal compliance with the regulations and the absence of fraud and bad faith, even if foreign bags are included in the bales.

The answer to this position is that section 2 of the customs administrative act of June 10, 1890, requires, without qualification, that invoices of imported merchandise shall contain a correct description of such merchandise, signed by the manufacturer or by the person owning or shipping the same, or by his duly authorized agent. As the foreign manufacturer or shipper is not within our jurisdiction or control, the law provides for the adoption by the domestic consignee or owner of the invoice of the statements of the foreign manufacturer and shipper as his own, and he thereupon becomes liable, under section 9 of the said act, for the employment or use of any fraudulent or false invoice, affidavit, letter, or statement, written or verbal, by means of which the United States shall be deprived of lawful duties.

The conclusion is, therefore, that both on the law and the examination of the bales under the regulations, the proceedings of the appraiser were not invalid as not being in conformity thereto.

The claim that the examination was contrary to Sec. 2901.

The statute (section 2901 of the Revised Statutes) is not mandatory. It is as follows:

> The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the

> appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

This statute was intended for the benefit of the Government, and not of the importer.

The objection based upon it is exceedingly technical, where it is plain that injury to the importer did not ensue by reason of the failure of the appraiser to examine at least one bale in ten.

Where the importer may apply to the courts to examine and review everything involving the legality of a demand by the collector, he does not require for his protection that statutes containing directions to officials as to the manner in which they shall be informed of the dutiable character of merchandise shall be regarded as mandatory. (*Origet* v. *Hedden*, 155 U. S., 228; *Erhardt* v. *Schroeder*, 155 U. S., 124.)

The purpose of the statute is to prevent fraud on the revenue by requiring that "the collector shall designate on the invoice at least one package of every invoice and

one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary * * * to be opened, examined, and appraised." In such a case as this, where the goods were entered as American-made bags, *all* of which were claimed to be entitled to free admission, and where the sole question is whether *all* the merchandise in question was entitled to free entry or not, if in each package examined the appraiser found dutiable goods, it was not necessary to examine each of the ten packages in order to determine whether the whole invoice was as claimed. A further examination would be simply cumulative, and no examination of a larger number of bags than were examined would change the fact that foreign-made bags were found.

Nor is there reason to suppose that one bale differed from another in character or quality; indeed, it is clear from the testimony that bags of foreign manufacture and American manufacture were indiscriminately mingled together, and no attempt was made by the importer, on entry or afterwards, to separate the bags claimed to be free and those which were dutiable.

The burden is upon the importer of overcoming the presumption of regularity of the examination by proof that the exaction of duties was unlawful. (*Erhardt* v. *Schroeder*, *supra*.)

Besides, the penal provisions of the statute show that it is for the protection of the Government in detecting and punishing fraud. It bears no marks of an intention to protect the importer.

In *Erhardt* v. *Schroeder* (155 U. S., 124) this court, speaking by Mr. Justice Shiras, said:

> An examination of one package in ten of the merchandise might have shown to the satisfaction of the collector that the importation was of the character the importer claimed it to be; the examination of one package in fourteen may have given the collector a different impression to the *disadvantage* of the importer. But the proceedings do not necessarily end with the collector's decision, and the importer's rights are not finally fixed until the character of the goods has been found by a court.
>
> The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance and the substantial protection of the Government as mandatory, and to consider official acts not in strict conformity with the statute as void.

As we have seen, the examination of a larger number of bales in any one invoice in this case would not in the slightest degree have affected the result arrived at by the appraiser. The importer sustained no injury. Even if he did, he should have applied for a reexamination, and should have produced evidence before the Board of General Appraisers to sustain the claim made in the entry that the bags were all of American manufacture, entitled to free entry, notwithstanding the report of the examiner and the return of the appraiser.

The communication of Ranlett & Stone to George C. Tichenor, president of the Board of General Appraisers,

dated New Orleans, April 9, 1894, makes the following claim:

> We claim that the evidence shows that the goods were not lawfully examined, as provided under section 2901 of the Revised Statutes, which states that one package of every ten shall be *opened, examined, and appraised;* and that failure to comply with said statute invalidated the appraisement, and in support of this claim cite the decision of the United States Supreme Court in the case of *Converse* v. *Burgess*, 18 Howard, page 413.

The case referred to turned upon the classification of an importation of sugar from Cuba upon which an ad valorem duty was payable. It appeared that certain sample packages were withdrawn which had been permitted to be exposed to the air, so that, as was claimed, they "would not afford a fair criterion by which to judge of the importation." From the appraisement made an appeal was taken to merchant appraisers. It was claimed by the importers that the merchant appraisers had not examined a sufficient number of the packages to be able to determine the character and value of the importation, and that they had the right, therefore, to go behind the return of the merchant appraisers.

It will be seen that this case has no application here, where there was no application for a reexamination, no appeal from the finding of the appraiser, and no submission of testimony or offer to submit testimony to prove the character of the goods when the question was being examined by the Board of Appraisers. Furthermore, in the sugar case, it was a question as to the value of the sugar, which might have been appraised at any one of

several values and ad valorem duty assessed accordingly. In this case it was simply a question of ascertaining whether bags claimed to be *all* American bags were actually *all* American bags.

The sample bags taken from the bales examined.

It is further stated in the letter of the importers to the Board of General Appraisers that, referring to the examiner, "the samples retained by him—87, one each out of 87 bales—representing shipments aggregating 2,925 bales, were neither sufficient in number nor so fairly drawn as to faithfully represent the goods and form a just basis for the action of the collector."

It appears from the Record (pp. 23, 26, 29) that the examiner and the appraiser complied with all of the regulations of the Treasury and took "every method to try to be just" about the examination. It further appears (Rec., p. 30) that the examiner "in some cases examined every bale of the whole entire invoice," and that (Rec., p. 31) he did not take a sample bag out of each bale opened and examined; that (Rec., p. 32) he used his "judgment to try to open sufficient to get at the classification of the goods," and that (Rec., p. 30) the samples that he took were all of foreign manufacture. He says (Rec., p. 30):

> I did not understand it to be my duty as an examiner that I should have anything to do with the few American bags I came across. I took the samples to show that foreign manufactures were found. I supposed if 75 per cent of the bags in the bale

were foreign manufacture, it carried the whole of them. That was my idea as an examiner, and the quantity in all these importations, where I opened the bags and counted, I found along about 80 to 86 per cent foreign make.

The 87 selected bags, therefore, could hardly be called samples of the bags contained in the selected bales. They were rather the proof of the United States of the presence of foreign bags in the bales examined, the examiner taking, after a careful examination of the whole bale, as he states (Rec., p. 30), not more than one bag from any bale he opened.

These bags were drawn from the bales at the time of the examination. They were not "for the action of the collector," but for the information of the appraiser. They presented to the appraiser indubitable proof of the presence of foreign-made bags in an importation claimed to consist solely of American-made bags. The appraiser thereupon made his return to the collector to the effect that the bales contained bags of foreign manufacture, and were dutiable at 2 cents per pound under paragraph 365. The collector thereupon assessed duty accordingly.

Mr. Naeff's testimony.

It is further stated (Rec., p. 14) in the same communication, "that the evidence and opinion of Mr. Naeff, called in as expert by the appraiser of this port on behalf of the Government, were diametrically opposite to those of the examiner."

The trend of Mr. Naeff's testimony was that he could

not swear that any of the bags were of American make. He says (Rec., p. 37):

> I could not swear whether it is American or foreign made; but what we have already taken on the foreign ships as being foreign are generally sewed with tarred thread.

Mr. Naeff's testimony was that he was engaged in the bag business, handling (Rec., p. 36) "mostly bags that are lent (loaned) to the ships, filled with grain, and, as a rule, shipped back again."

It is a matter of knowledge to the trade that the bags referred to by Mr. Naeff are what are known, technically, as "ship's bags," because it is the custom of the bag makers not to sell these bags outright to the ships, but to loan them for a voyage. These bags are entirely different from the cental bags in controversy. It does not follow that familiarity with "ship's bags" would enable the dealer to identify cental bags and name their country of origin.

Furthermore, the burden of proof being on the importer, if there was any question, as Mr. Naeff appeared to think there was, whether certain or any of the bags were American or foreign, the importer must show, beyond question of a doubt, that they were not foreign.

It seems to have been the practice of the custom-houses at first in dealing with importations of bags to find the percentage of foreign-made bags in the invoice and to assess duty upon them and admit the remainder free. Subsequently, however, the Department became aware of the frauds perpetrated upon the revenue by the

importation of foreign bags claimed to be American. Not having sufficient proof to establish the fact of fraud, however, the appraisers returned all such importations of bags claimed to be free of duty as foreign made when they found foreign-made bags present therein, basing their action upon the decision of the Treasury (synopsis 10098) in relation to the proposed importation of anthracite and bituminous coal, in which the collector was instructed that the whole cargo should be treated as bituminous and assessed for duty.

The separation of foreign and American bags, which are so similar in appearance that they can only be told apart after a very careful individual inspection, if at all, would be even more irksome than a separation of anthracite from bituminous coal, both of which are recognizable at sight.

Intermingling of the bags prima facie evidence of fraud, in effect if not in intent.

Though there is no evidence in the record of fraud on the part of the importers in the present case, the fact remains that foreign-made bags were invoiced and entered with others as American-made bags entitled to free entry.

In this connection it is to be noted that the Record (pp. 1 and 40) states that these bags were purchased under a guarantee that they were bags of American manufacture, shipped from the United States filled with the products thereof, and entitled to free entry on their return to the United States. The very fact that the importers deemed it necessary or proper to exact a guarantee

shows that they had knowledge of the practice prevailing among certain importers at the time, of importing into the United States foreign-made bags under the claim that they were American-made bags entitled to free entry, and protected themselves in this way from loss if the bags purchased by them were found to be of foreign manufacture and were assessed with duty.

Such frauds on the revenue resulted in an investigation by the Treasury Department and a breaking up of the practice. The Treasury records show that after this investigation there was a large increase in the importation of dutiable bags and a corresponding decrease in the importation of free bags. When the increase in the dutiable bags is noted, it is not difficult to understand the reason for the decrease in the importation of free bags.

In the absence of any express statute forbidding the importation of such goods intermingled together, it is obvious that such procedure is forbidden by the policy of the law. The very fact of importing dutiable and nondutiable goods in the same package without separately invoicing them, and then entering them *all* as free of duty, is, it is submitted, *prima facie* evidence of fraud, for the importer does not contend that *all* of the bags were of American manufacture and entitled to free entry. After their discovery by the examiner in the bales examined the importer admitted the presence of foreign-made bags in the bales examined. He made no attempt at any stage of the case to establish by evidence that the bags were actually of American make. He must be

held, therefore, to have admitted the foreign-made bags found by the examiner to be such. (Rec., p. 39, 40.)

This evidence is further strengthened by the fact, which has just been stated, that the importers, who must have had knowledge of the frauds then existing in the bag trade by which foreign-made bags were brought free into the United States, and which made it impossible for the honest to compete with the dishonest importer, required their vendors to indemnify them against a failure to secure free entry to the United States.

Mr. Ranlett (Rec., p. 40) said:

> To *guard* ourselves, we exacted from the shippers that they [the bags] should enter this country free of duty, and they invoiced them as bags of American manufacture, and contend that they are still entitled to free entry, and the consequence is *we are still unable* to collect our guarantee.

From this it would appear that, having been required by the United States to pay duty, they have endeavored to collect the amount paid under the indemnity bond. In other words, while contending here that the bags were of American manufacture entitled to free entry, they are insisting to their vendors that they were not.

The United States, in customs matters, can not deal directly with the foreign vendor who has knowledge of the character of the goods which he is sending to the United States. It deals with the importer. The importer here, as in every other case, was required to make affidavit as to the character of his goods.

Ordinarily such affidavit must be based upon the information conveyed to him by the foreign shipper, but

with the knowledge of the frauds being perpetrated in connection with the importation of such bags, in view of the fact that they deemed it *necessary* to require an indemnity bond, and of the further fact that, as stated in the record (p. 40), the "people on the other side" are unable to distinguish between foreign and American bags, separate them, and guarantee their free entry, how could the importers in this case honestly make the affidavit required by the customs regulations?

The importer can not, moreover, by any contrivance, so import, enter, or invoice his merchandise as to escape from the necessity of proving that his goods are as he represents them by his custom-house entry to be. In the present case the method of the importation seems to have been adopted to circumvent the Treasury regulations. It has not been customary to import articles of different values, or dutiable and nondutiable articles, in the same package. Whenever, in small importations, goods of either of these classes have been imported in the same package, it has always been the practice to invoice them separately.

In the Record (p. 42) the Board of Appraisers, in their decision in this case, state as follows:

> In a carefully prepared paper, in the nature of a brief or argument, by one of the protestants herein for the consideration of the board at the time the oral evidence was taken the claim is made that the documents required by regulations for the identification of the goods have been furnished, with the exception of those relating to merchandise exported by the *Viscount* from San Francisco, January 14, 1892, marked "B. X. X." In regard to them the

protestant states: "These are not available, having apparently been used by others."

There are sundry other lots referred to in the brief where the absence of the identifying certificates is accounted for by the statement that they are "not available" or "not obtainable." It is also admitted in the same brief that sundry other lots are excluded from free entry by reason of their having received drawback on exportation, and these two classes admittedly excepted from the provisions for free entry cover many thousands of bags of the importations now under consideration.

These admissions add to the evidence we have *aliunde*, that not only are the so-called returned bags not seen by the foreign exporter, nor by the home importer, who both make oath regarding their manufacture, but the documentary proof of identity required by law is indiscriminately disposed of to anybody who has bags to sell and can find a purchaser in the United States. The brief or argument closes with this statement, signed by the importer:

"As I have not personally seen or inspected them (the bags), I am unable to state whether they are all American manufactured or only a portion of the same. This evidence, I presume, will be furnished by the appraisers who have examined the same."

The court is respectfully referred to all the decisions of the Board of General Appraisers contained in the record, for a comprehensive indication of the methods and transactions in free-entry bag cases.

Examiner and appraiser not required to separate the bags and to ascertain the percentage of each.

All of the bags having been entered as of American manufacture, and, upon examination, the appraiser hav-

ing returned them all as dutiable, because he had found in the bales examined foreign-made bags, such examination was not void because the examiner failed to examine at least one bale in ten.

If the appraiser, upon such examination, had returned a certain percentage of the bags as of American manufacture, and a certain other percentage as of foreign manufacture, and the collector had assessed duty accordingly, then the examination of a larger number of bales from each invoice might have increased or decreased the percentage of foreign-made bags found.

But as from the examination made the appraiser was convinced that the importation contained foreign-made bags in quantities, he was required to do either one of two things: To separate the bags in each bale so as to ascertain the number of American and foreign-made bags, respectively—which would have required the examination of each individual bag in at least each of the sample bales examined; or, having found foreign-made bags in an importation entered as American-made bags free of duty, to return the entire invoice represented by the sample bales as subject to duty.

The burden of proof being ever on the importers to show that the goods which they bring to the United States are not subject to duty; that they are within the exception and not the rule, it was no part of the duty of the examiner or the appraiser to do the former. The appraiser, upon the report of the examiner, was to take the sample bales as he found them and ascertain their character. He did so and found them different from

what they were represented by the importers to be. It was not his duty to separate the bags into the two classes and return the one as dutiable and the other as entitled to free entry. He could return the bags as American-made bags if satisfied they were such, or foreign-made bags if he so concluded.

To return them as American bags when his examination disclosed the presence of foreign-made bags would have been a violation of his duty to the Government; to return them as foreign-made bags would not be unjust to the importers, because the presumption exists that they are foreign-made bags until proved otherwise. To say that it is his business to separate the foreign from the domestic bags is to say that the Government employs him to do a vain and irksome thing at its expense for the convenience of the importers; to officially recognize a course of procedure in the importation of foreign merchandise which opens wide the door to fraud, and which would entail upon the Government in the expense of examination greater cost than the amount of duty that could be collected.

The appraiser, therefore, was justified in returning the bags as of foreign manufacture. His action was simply a notification to the importers that, after an examination of their merchandise, the evidence which they presented to the custom-house in support of their contention that the bags were entitled to free entry was not deemed sufficient, and it thereupon became the duty of the importers, if they deemed the examination insufficient, to apply for a reexamination. If upon such a reexamination the appraiser still adhered to his position, it would then be the

duty of the importers, upon appeal to the Board of General Appraisers, to submit evidence to prove that the bags in question were of American manufacture and entitled to free entry. Neither of these things was done in this case.

II.

APPLICATION OF SECTION 2910 OF THE REVISED STATUTES.

Section 2910 is as follows:

> When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject.

Literally this section applies only where merchandise of different values is invoiced at an average price. But as the value of the merchandise here involved is not free from controversy, if a literal interpretation is to prevail without consideration of the object of the statute, it might exclude the present case. The object of the section, however, is to prevent the indiscriminate mingling of goods of different values but of the same material and description in importations, so as to render difficult the ascertainment of the character and value of the respective goods present, and thus lead to fraud on the revenue.

While it would seem from the testimony of Mr. Ranlett (Rec., p. 40) that foreign and American made bags are not of different values, yet as matter of fact the American bags have the advantage in the foreign market

for bags, due to their right to free entry, and therefore, when intended for exportation to the United States, doubtless sell for somewhat more than foreign bags. Consequently it might fairly be claimed that the foreign and American made bags in this importation were of different values, and therefore that section 2910 literally applied.

But the inquiry for tariff purposes, where goods of like description and material, but differing as to dutiability or nondutiability, have been invoiced together generally as not dutiable, so much resembles the inquiry as to similar goods of different values invoiced as dutiable at a rate applicable only to one, that it is difficult to see any real distinction between them. So far as the purpose and object of the inquiry in each case is concerned, it is identically the same. It is to protect the public Treasury, so that goods which ought to pay a greater amount of duty shall not be allowed to be brought in on payment of a less amount under cover of a grouping with goods properly paying a less amount or brought in free. It is for this reason, and to prevent experimenting with the judgment of the appraiser, that both statutes and customs regulations provide that the importer shall carry out separately, under the appropriate head in his entry, the value of each description of goods paying a different rate of duty. (Rev. Stat., sec. 2785; Customs Reg., 1892, art. 277, 278.) This is so, even when he claims his goods are entitled to free entry; the goods must be invoiced and invoice certified to the same as if dutiable. (*United States* v. *Mosby*, 133 U. S., 273; *Phelps* v. *Siegfried*, 142 U.S., 602.) The present case is but a particular

application of the principle involved in that broader and more general rule.

As a penalty for disobedience of this rule, and because otherwise it would be practically impossible to prevent partial evasion of the tariff laws in such cases, Congress has provided that in all instances where goods of different dutiability are so invoiced together, all shall pay the duty; that is, the highest duty which any of the goods if separately invoiced would pay.

This whole reasoning holds with equal force as to an invoice of two makes of bags of the same description, but of different dutiability and material, invoiced under one general description, which in reality applies to one make only, but affects the duty to be paid by both. Though Congress directs in words that different values shall be taken notice of, the substantial meaning of the whole sentence is that a difference in *dutiability* shall be taken notice of. Free goods invoiced generally and indiscriminately with dutiable goods of the same description and material is as great if not a greater evil, and is the same sort of an evil, as is an invoicing of higher-duty goods with lower-duty goods. It is, equally with the latter, the evil intended to be controlled by section 2910.

An analogous rule of classification for customs purposes to the rule of section 2910 is that which provides, stated very generally, that articles composed of two or more materials shall be assessed at the rate of duty charged upon the component material of chief value. The same general principles are the foundation of both rules.

In cases under section 2910 the whole invoice is to be assessed at the rate which the highest valued goods would pay. Here the question is whether, dutiable goods being found in a bale together with nondutiable goods, the whole bale shall be subject to duty.

What is to be considered the unit for the purposes of the customs laws in examining and appraising? Clearly the bale. The importer buys by the bale and sells by the bale. It can not be said that the bag is the unit. It is not so invoiced or entered. The entry was not of so many thousand bags, but of so many bales of bags. A single bag is of comparatively small value. If each one must be scrutinized, then to carefully examine and appraise the entire three million bags would entail an enormous amount of labor on the customs officers, which would cost more than the amount of duty recovered. Such a requirement was never contemplated by the customs laws.

As we have seen, the law carefully provides that proof of identity of the bags sought to be brought into the United States free of duty shall be furnished. By implication, this provision requires that the bags shall not be so imported that, as in this case, neither the customs officers nor the owner can with absolute certainty identify them. They should be so separated and packed that the customs officers can, with facility, determine what is dutiable and what is not dutiable, and assess the one and pass the other.

The fact, as is alleged, that the importer bought in good faith and imported in good faith is no criterion by which

to judge his rights. The question to be determined is the *fact* whether the bags were American bags or not.

The importer must distinctly specify on his invoice and entry whether the bags are foreign or domestic. Unless clearly proven by him to be domestic, all are dutiable. He can not compel the United States to ascertain for him how many he is entitled to have entered free, nor to identify his particular bags as the bags which he or someone else exported from the United States and sold to him or to his vendor. Even if so identified, the *fact* they are American bags must still be established by him.

The Government says to the importer, "Bring your American-made bags here and I will admit them free of duty." The Government does not say, "Bring your bags here and I will examine them, and if I find there are American-made bags among them I will admit those free and assess duty upon the others."

Notwithstanding it is earnestly claimed that the importers were "without fraud in the premises," it is apparent that this is an attempt *by someone* to evade the tariff laws by indirection. It is a commonplace of the trade that these methods are often pursued. If the attempt is successful, many ways will readily be found to cast upon the Government the burden of proving its right to collect its duties.

III.

THE ACT OF FEBRUARY 8, 1875, HAS BEEN REPEALED.

It is claimed in the protest (Rec., p. 5, etc.) that the bags were entitled to free admission under the act of

February 8, 1875, as bags other than of American manufacture, in which grain shall have been actually exported.

The question whether this act is still in force was passed upon by the circuit court of appeals for the second circuit, in the case of *Kent* v. *United States* (73 F. R., 680) the court, speaking by Shipman, J., holding it to have been repealed.

IV.

THE BRIEFS FOR THE APPELLEES.

The proceeding of the Board of General Appraisers was not, as stated by opposing counsel, "perfunctory." On the contrary, it is shown by the Record (pp. 43, 52) that the Board of Appraisers sent one of its members to New Orleans to take testimony in the case. It was only after careful investigation, and with the knowledge which they had acquired in connection with previous similar cases, that the board sustained the action of the collector. The circuit court, which reversed the appraisers' decision, however, appears to have acted in a perfunctory manner. It nowhere appears that it took additional testimony, and no opinion seems to have been rendered. It simply reversed the decision of the Board of Appraisers and entered a decree which, as has been shown, is impossible of execution.

This is not a class case. There are no other cases dependent upon it. Cases of this kind were provided against when the Department became aware of the frauds that had been perpetrated.

It is *not* conceded by the Government that the importers acted in good faith. Under the certification of questions, the circuit court of appeals having assumed that fact, the Government was not in the position to charge fraud. The Government does not now *charge* the appellees with fraud, but, as above shown, it contends that the action of the importers was *prima facie* evidence of a fraudulent device on the part of someone to bring dutiable bags into the United States without paying duty thereon. The fact of the matter is that subsequent to this importation the investigation entered upon by the Treasury Department established the fact long suspected of fraud in many cases of this kind. While it suspected fraud at the time of this importation, seizure was not made because the Government did not have sufficient proof, and if the goods had been seized proof of fraud would have been upon the Government.

As has been shown, the importers did not "furnish the evidence required." Anything which was short of the absolute proof of identity was not a compliance with the law or the regulations. If the goods themselves, on inspection, were shown to be foreign made, or even raised a doubt as to their character, the appraiser had to be governed by his inspection of the goods. The decision (synopsis 14912) by Assistant Secretary Hamlin was issued before the Treasury Department became aware of the frauds in bag importations. It was afterwards modified (synopsis 18425). The fact that Mr. Hamlin or the collector of customs at New York was of the opinion that no law prohibited the importation of such bags

mixed together is immaterial. The opinion of an executive officer upon a question at law does not bind the Government in matters of its legal rights.

The necessity of examining more than the usual number of packages is for the protection of the Government, when the examination of the number ordinarily required might not disclose, or fully disclose, the character of the merchandise for the purpose of appraisement. (*Erhardt* v. *Schroeder*, *supra*.) This is further shown by the fact that formerly (sec. 22, act April 20, 1818, 3 Stat., 433, 438) the collector was required to cause "at least one package of every invoice, and one package at least out of every fifty packages * * * to be opened and examined, etc." No doubt the various evils of fraud and evasion, and especially that of undervaluation, dictated the increase from one in fifty to one in ten. But this was for the Government's protection and not for the importer's.

But while the Government does not charge fraud, or necessarily impugn the good faith of the importers, it calls attention to the fact that, being in the trade, they were necessarily aware of this course of dealing, or, if they were not, their ignorance and blindness served as a shield for fraud and bad faith on the part of foreign vendors and shippers, or other persons unknown, whom the Government can not reach. In either case fraud upon the Government was the effect and result of the transactions.

The cases of *Oelbermann* v. *Merritt* (123 U. S., 356) and *Robertson* v. *Frank Bros. Co.* (132 U. S., 17), like

the previous case of *Converse* v. *Burgess* (18 Howard, 413), were cases in which merchant appraisers were called upon to appraise the merchandise involved, and in which appeals were taken from the action of the appraiser. Their examination might either increase or decrease the estimated value of the merchandise, and change the amount of the *ad valorem* duty payable. In this case, if there had been a reexamination, which was not, however, applied for, or if a larger number of bales had been examined, it could not possibly have shown anything different from that which the examination which was made had disclosed. All of these cases were cases of appraisement; here it is a question of examination or "ascertainment," as distinguished from appraisement—that is, the ascertainment whether the goods are actually as they are claimed in the entry to be. The question of the value of the bags, whether they were worth one amount or another, did not enter into it. In fact, the importers claim that whether the bags were American or foreign the value was the same.

The importers take exception to the lack of experience which they claim on the part of the examiner. In the very nature of things the examiner can not, in many instances, be as familiar as the manufacturer or importer with the particular art involved. The manufacturer may improve his output and no knowledge of his improvement come to the notice of the examiner until the goods reach his hands. In this case the "testimony of persons of requisite experience"—the importers themselves—could not be presented to the appraiser, for, as

we have seen, his duty was only to ascertain whether the bags actually imported were one thing or another; and such testimony was not presented when opportunity was offered by the Board of General Appraisers. The opposing argument loses sight entirely of the fact that the examiner and appraiser, both of whom the record shows were qualified to judge, on examination found that *some* of the bags claimed to be American were foreign-made.

On page 10 of Mr. Maury's brief at the former hearing he says, "but supposing, for the sake of argument, that the presence of foreign-made bags in the packages examined was established, it was *purely arbitrary* to assess duty on all the importations to which such packages belong as consisting *wholly* of foreign-made bags." It would have been equally arbitrary if, having discovered foreign-made bags in an importation claimed to be exclusively of American manufacture, the appraiser had found *all* the bags to be American, and the collector had admitted them free.

The importers, then, appear to have purposely adopted the plan of intermixing the two kinds of bags, supposing, in a mistaken view of the law, that the examiners would either have to do the very irksome duty of examining each individual bag, or else passing the invoice as entered—that is, as American bags entitled to free admission. The examiner and appraiser did neither. They adopted the plain, common-sense view of ascertaining whether the thing was as it was claimed to be, and finding it not to be as claimed simply said so, and called

upon the importers for more proof of his claim. In other words, the presumption being that the importation was foreign, the examiner and appraiser after examination simply said that, notwithstanding the evidence presented by the importers, they still regarded it as foreign.

Mr. Maury, on page 12 of his earlier brief, quotes section 2901, Revised Statutes, and italicises the concluding portion thereof. It has already been stated why the goods were not seized. The appraiser did *in effect* exactly what under this section counsel contends he should have done—that is, the articles (i. e., the foreign bags) were added to the entry and duty assessed thereon. Counsel says (p. 12) "it will hardly be contended that the appraisers *found* bags of foreign manufacture in the packages which were not even opened by them." This argument is unique. If it is correct, then it necessarily follows that the bales sent to the appraisers' stores were not "samples," and that every other bale in the entire importation than those examined must be held to be of American bags exclusively.

Reference is several times made to the "accidental" presence of foreign bags in the bales examined. The accidental presence of from 75 to 86 per cent of foreign-made bags in an importation of nearly three million bags claimed to be entirely of American manufacture is rather unique, to say the least; besides, the "accidents" appear to have occurred with remarkable regularity and uniformity in the bales examined!

The importation was one of two things—either it was, as claimed, American bags, or it was not American bags. As in the packages examined it was found that there were foreign bags, it could not have been that the importation was exclusively of American-made bags, which alone the statute permits to be entered free of duty. It was consequently useless to examine a larger number of packages than were examined, because such examination would not remove the already ascertained fact that the goods were not exclusively of American manufacture. The importer, therefore, has not been injured by the failure of the examiner to examine at least one package in every ten.

Counsel said that "there is no law forbidding the importation of domestic and foreign bags in the same package," but here American bags only, it was alleged, were contained in the packages. The appraiser had to verify this fact, if such it was, and found on the contrary that all were not American bags. We have not, therefore, in this case an entry of foreign and American made bags in the same package, invoiced as American and foreign made bags, but an invoice of American-made bags which, on examination, proves to be, in part at least, composed of foreign dutiable bags.

On page 13 (Maury brief at former hearing) counsel say that it was "unreasonable to the last degree" to require the importer to properly separate and designate his merchandise. This assumes innocence on the part of the importer, but the circumstances surrounding the case

impute knowledge to him. If he was innocent, as claimed, then his vendor was guilty. There was privity between him and his vendor, and not between the Government and the vendor, and the discovery of the fact that the goods were not as the importer, let us say, believed them to be could not throw the resulting burden upon the Government.

Counsel say (p. 16) "the importer believed that the contents of the bales of each importation were bags of American origin, and he adduced the prescribed legal proof that they were such. Surely the proof thus adduced must stand until legal evidence, of some kind, to the contrary is produced by the Government." The Government did produce "legal evidence;" it produced evidence which was not "vague or doubtful;" it produced irrefutable evidence when it produced the foreign bags themselves from the bales.

The separation of foreign and domestic bags by the examiner was practically impossible. In this case, to use the words of counsel, "the importer has designedly produced a condition of things which has given a dutiable character to the whole mass," and must abide by the consequences.

In the earlier briefs counsel claim it to be the right of the importer to bring in the bags mixed together (Semmes brief, p. 9); elsewhere it is asserted that the mixing was accidental (Maury brief, p. 19). It is certain, however, that the bags were mixed together, and that the importers indemnified themselves against the discovery of the "accident."

It is also stated in the brief that the American bags should have been admitted free even if (after an examination) some foreign-made bags were assessed for duty; but it must be remembered that the protest was against the exaction of *any* duty on *any* bags.

V.

THE MOTION TO STRIKE OUT, ETC.

Although it is not specifically stated in the record, it is understood that as cases involving importations of bags by the appellees here and by Mr. Henry Charnock were pending at the same time before the Board of General Appraisers, both having arisen at the port of New Orleans, the testimony taken by Mr. Wilkinson, one of the members of the board, was taken in both cases at the same time. It does not appear from the record that any agreement was had that the cases should be heard together. It is evident, however, from the fact that the return of the Board of General Appraisers in this case contains portions of the testimony taken in the Charnock case, that there was an agreement, either tacit or expressed. The board say (Rec., p. 19), "There is returned herewith the testimony taken by the board relating to the protests covered by the decision herein. Said testimony is marked Exhibit Q." Exhibit Q is found on page 27 of the record and contains the testimony objected to. No reason appears, therefore, for striking out the portions of the return of the Board of General Appraisers set out in the Record, page 55, unless the fact that those

statements are prejudicial to the importers. To the ruling of the court striking out the parts referred to, the district attorney (Rec., p. 54) reserved an exception.

VI.

THE DECREE BELOW.

The decree of the circuit court provided as follows:

> The court doth further order, adjudge, and decree that the duty paid by the importers, Ranlett and Stone, on the 2,925,000 bags imported by them * * * be refunded and paid to petitioners, * * * and the court doth declare that the examination heretofore made of said bales of bags is void and not in conformity to law or the regulations of the Treasury Department, and any liquidation of duties based on said examination is illegal and void, and the liquidation of duties heretofore made be set aside, and the money received from Ranlett and Stone as duties be refunded as aforesaid; and the court doth further order and decree that the collector direct a reexamination of said bales of bags to be made according to law, and on such reexamination to reliquidate the duties which may be lawfully due thereon.

This decree was entered December 20, 1895. It directs a reexamination of the bales, which was not asked for by the importers at the time of the examination, and after the importers (who at the time were apparently satisfied with the *examination* because they did not ask for a reexamination), had received from the Government and presumably disposed of their goods. The reliquidation of the duties decreed is made to depend upon a reexamination.

The merchandise in controversy having been long since delivered to the importers, including the sample bales which had been retained by the appraiser, and having doubtless passed into commerce, it is obvious that the decree is impossible of execution.

It is to be noted that the action here, as commenced in the circuit court, was against the Board of General Appraisers; that a copy of the petition was served upon the collector; that the decree of the court is against the collector and directs the return of the duties paid. The act of June 10, 1890, contemplates that customs suits, when instituted by the importer or his agent, shall be against the United States. Section 24 provides a permanent indefinite appropriation for the payments of judgments against the Government in customs cases, and section 25 provides that "no collector or other officer of the customs shall be in any way liable," etc., in such cases. The collector having paid into the Treasury the amount of duties collected by him, as he is required by law to do, this decree can only be effective as a decree or judgment against the United States—which it is not, at least in form.

It is respectfully submitted that the decree of the circuit court should be reversed.

HENRY M. HOYT,
Assistant Attorney-General.
W. J. HUGHES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT, v. RANLETT AND STONE. } No. 20.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The learned counsel for appellees, on page 2 of their brief at this hearing, say that the claim of free entry was based on a *strict* compliance with the regulations of the Treasury Department. We have endeavored to show that even if all the documentary evidence was submitted, including the exportation certificates, it was still necessary to show identity as of American manufacture, and whether upon reexamination or reappraisement—before the Board of General Appraisers or in court—the necessary evidence to establish this fact should have been produced by the importers, which was not done. The

case is not, as implied on page 40 of the opposing brief, that the door was open to the Government for the entrance of all expert witnesses who could be produced. This door stood open, rather, to the importers, but they did not seek to enter it.

This misconception as to the burden of proof vitiates entirely the opposing argument. But was there a strict compliance with the Treasury regulations? The record, unfortunately, does not show just what documents and certificates were presented by the importers, and, except by the importers' general assertions, whether in all the invoices the exportation certificates were produced or the customary bonds to produce them given instead, and whether, consequently, these bonds were canceled upon the production of the appropriate exportation certificates.

On pages 5 and 6 of the opposing brief, reference is made to a "pretended examination." Such language assumes an absence of good faith on the part of the examiner and appraiser. The record, page 29, shows that the examiner, to use his language, took "every method to try to be just" in the examination. Such language as "pretended examination," and the "going roughshod over the law," is without justification.

The brief in many places attempts to impugn the good faith of the Government officers. The reference to the appraisers and the collector as having "acted as though the principle that citizens can not be taxed on doubtful premises had been expunged from our jurisprudence" is like the above, and requires no answer.

On page 9 counsel say that in "some only" of the packages were foreign made-bags found by the customs

officers. This is not the fact. The record shows that from 75 to 86 per cent of the bags, as estimated by the examiner, were foreign. Furthermore, the examiner did not take a foreign bag from each bale that he examined, but in each of the bales he examined he said that he found foreign-made bags.

The action of the customs officers was not "arbitrary." They examined the bales carefully and in each of them found foreign-made bags. It was no more arbitrary to assess the bags as dutiable than it would have been to pass them free after foreign-made bags had been found. The latter course would have contravened a plain official duty.

The bags were returned as dutiable, the same as if they were composed exclusively of foreign-made bags, because they were entered by the importer as exclusively American bags, which, upon examination, they were found not to be. Until shown to be all American bags they were properly dutiable as foreign bags.

It was not the business of the examiner and appraiser to *absolutely* determine the fact whether the bags were foreign or not. Having determined that fact to the best of their judgment, it was for the importer to show that their view was mistaken, and not for them, acting as they were in a *quasi-judicial* capacity, to submit to the importer's proof in support of their finding as to the character of the bags. The whole argument of opposing counsel is based on the underlying assumption that the action of the examiner and the appraiser should be considered as though it had never been taken, and that the finding of

those officers was without any legal force or effect whatever.

The true rule is that into the statute which permits the free return of American-made bags must be read the requirement of the law that all merchandise upon its arrival in the United States must be examined by the examiner and appraiser to ascertain whether the facts in relation thereto, as represented by the importers, are correct or not. If this is not so, what purpose in the scheme of customs collection do these officers serve?

On page 12 reference is made to the "proof" submitted by the importers. There was no *proof* whatever. There was certain documentary evidence submitted in an attempt to prove that the thing imported was what upon an inspection of the thing itself it proved *not* to be. The importers stopped short of the requirements of the statutes in relation to proof of identity. The law reads into the statute and the regulations the requirement that the evidence submitted shall be borne out by the merchandise itself upon an inspection thereof. Otherwise there would be no use in examining the merchandise itself, but only of examining the evidence or documents presented by the importers in relation to it.

As to the reference to the analogy of a jury trial, on page 13, this was not in its nature at all like a jury trial, but was a statutory proceeding of a special character before specially qualified statutory officers and a statutory tribunal.

The examination was neither "imperfect" nor "illegal," as has been shown; nor made by incompetent officers without knowledge or experience, as the record

shows. It might be in the case of some particular selected bag that the examiner and appraiser could not tell definitely whether it was foreign or American, but the examination of the examiner (Rec., p. 32 et seq.) shows that his knowledge of the difference between American and foreign bags tested by material, stitch, selvedge, and general appearance, was superior to that of other witnesses examined.

Counsel say, on page 19, "the question here is not whether the bags were made of foreign material, but whether the material, foreign or domestic, was made up or manufactured into bags in this country." The statute provides for the free admission of "articles the growth, produce, and manufacture of the United States." The question whether bags made in the United States of foreign materials can be admitted free of duty in any proper case, or whether the statute applies only to bags manufactured wholly in the United States, is not material here; and besides if bags are made of imported foreign material they generally claim the drawback allowed by the statutes, whereupon they are not ordinarily admitted to free entry. There is no claim that these goods, although of foreign material, were manufactured in the United States. The claim in the entry is that they were all American-made bags exported from the United States and returned. The claim now is that if all were not American bags still duty should have been assessed upon such as were found to be foreign and the remainder admitted free.

As to the statutory proof (p. 29, last paragraph), it was not submitted until all of the facts necessary to en-

title the merchandise to free entry were established to the satisfaction of the examiner and appraiser. "It does not seem to have occurred" to opposing counsel that the evidence which they submitted was submitted for the express purpose of satisfying the appraiser and examiner, and was by them deemed insufficient. If those officers had any duty to perform it was to determine the sufficiency or insufficiency of this evidence. Having determined it to be insufficient they could not submit additional proof to themselves to change their views.

"The innocent importer" is not "taxed on mere presumption." As a matter of fact, when the examination disclosed foreign bags the presumption was at an end, and the bags were properly taxed. Even if not, however, the bags might be taxed upon a presumption, because it is presumed that all importations are liable to duty until they are shown to be within some exception to the rule. "The gross abuse of discretion practiced by the appraisers" consisted simply in their refusal to make a separation of the bags, which should have been done by the importers before entering.

On pages 31 and 32 counsel state that by section 14912 the Treasury Department directed an examination of the legal number of packages and such examination of the contents as will reveal the character of the bags contained therein, and that the Department did not change this ruling and require the separation by the importers of the bags into packages of bags of foreign and domestic origin, respectively, until the month of April, 1898, or until the promulgation of section 18425, dated October 2, 1897. On the contrary, while the new regulation was

not finally announced until the date of the last-mentioned circular, the practice of the Department had long been in accordance with the new rule and had conformed to G. A. 2613, dated May 5, 1894 (preceding G. A. 2623, *in re* Ranlett & Stone), which required segregation by the importers from the same class of goods such portions as are claimed to be free, and therein reversed G. A. 2448, which held, in effect, that customs officials should do the work of separation.

Finally, it is submitted that while in the Treasury investigations it was matter of complaint by importers protesting against the methods obtaining that the examination in previous bag cases by the appraising force, under which the bags were passed free, was careless and insufficient from the Government standpoint, there was no complaint or criticism by other interested importers on this score until duty began to be assessed.

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